92-1248

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October Term 1992

C. D. DI GIAMBATTISTA,
Petitioner

v.

SHEILA E. MC GOVERN, J.
JEREMIAH J. SULLIVAN, J.
WILLIAM HIGHGAS, JR., J.
VINCENT F. LEAHY, J.
RICHARD H. LIEBMAN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I

Whether Congress intended that state judges charged with predicate act violations defined in 18 U.S.C. §1961 are exempt from suit under §1964(b) and §1964(c) unless their acts were taken in clear absence of all subject matter jurisdiction.

II

Whether Congress intended to place a greater burden when seeking relief upon 'any person injured in his business or property' under §1964(c), civil RICO, than upon a public prosecutor proceeding under §1964(b).

III

Whether the opinion of the First Circuit Court herein that four state judges acted within their jurisdictions and are immune from civil RICO liability is, on the law and facts, an honest and faithful opinion; or is self-serving in a mistaken notion of 'absolute judicial immunity.'

THE PARTIES

C. D. DI GIAMBATTISTA

Plaintiff Pro Se

SHEILA E. MC GOVERN, J.

Defendant. First Judge, Middlesex County (Mass.) Probate court.

JEREMIAH J. SULLIVAN, J.

Defendant. Formerly a recall judge, Middlesex County (Mass.) Probate Court

WILLIAM HIGHGAS, JR., J.

Defendant. Formerly a judge, Middlesex County (Mass.) Probate Court

VINCENT F. LEAHY, J.

Defendant. Judge, Middlesex County (Mass.) Probate Court.

RICHARD H. LIEBMAN

Defendant. An attorney.

SCOTT L. HARSHBARGER [1]

Attorney General, Massachusetts

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1. The Massachusetts Attorney General represented the four judicial defendants as allowed by law. On December 6, 1991 the Attorney General allowed Richard H. Liebman, an attorney and convicted felon, to 'join' the judicial defendants' motion for dismissal of the complaint on their pleading of judicial immunity. The district court judge, Mazzone, J., USDC, then dismissed.

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OPINIONS IN THIS CASE DELIVERED BELOW

By reason of reassignment when the district judge to whom the case was originally assigned took senior status, plaintiff's civil RICO complaint received different treatments in the United States District Court for Massachusetts. The original judge, David S. Nelson, J., found the issue joined and ordered discovery in the first amended complaint for racketeering activity in the Middlesex Probate Court. Page 177 herein.

Upon receiving the case by reassignment, Judge A. David Mazzone of the same court ordered the civil RICO complaint dismissed. In a three-page memorandum, page 42 herein, Judge Mazzone dismissed the complaint on grounds of 'absolute judicial immunity' without commenting that one of the five defendants, an attorney and convict readmitted to the bar, took a free ride.

Plaintiff appealed, and petitioned the Court of Appeals for the First Circuit for in banc review of the dismissal, stating that claims of judicial immunity involved unavoid-

able self-interest, with prejudice to the appellant which a wider panel could mitigate. Page 72 herein. The First Circuit Court denied the petition for in banc review in an order which was broadly based (Breyer, CJ, Campbell, Torruella, Selya, Cyr, JJ.) Page 84 herein.

In a ten-page opinion which is at page 27 herein, the First Circuit then affirmed the dismissal of the complaint by Judge Mazzone and supplied missing argument why the attorney had not got a free ride. It was the conclusion of the First Circuit that in the commission of seven predicate acts detailed in the appellant's principal brief, none of the four judicial defendants incurred civil RICO liability because they had not acted in complete absence of subject matter jurisdiction.

However, as early as June 1987 the state Appeals Court had annulled one of the seven judicial acts as having been taken in absence of jurisdiction. Page 96 herein.

The opinion of the First Circuit was also

OPINIONS IN THIS CASE DELIVERED BELOW

in demonstrable error in issues of fact and of state and federal law. The appellant accordingly petitioned the First Circuit for rehearing. Page 85 herein. Rehearing was denied. Page 98 herein.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

STATUTORY GROUNDS

Plaintiff brought his original complaint, No. 91-11140-N, and first amended complaint in the United States District Court for Massachusetts, invoking the original jurisdiction of the district court pursuant to 18 U.S.C., §1964(c) for damages and other relief arising under 18 U.S.C., §§ 1961-1968, the Racketeer Influenced and Organized Crime Act (RICO).The complaint alleged the existence of an ongoing racketeering enterprise separate from the legitimate business of the Middlesex County Probate Court of Massachusetts and named four judges and a lawyer as defendants.

The complaint was dismissed by the district

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

court on January 6, 1992.

On September 4, 1992 the Court of Appeals for the First Circuit affirmed the dismissal below.

The First Circuit denied this appellant's petition for rehearing by an order entered November 13, 1992.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

PRAGMATIC GROUNDS

The acting United States Attorney for Massachusetts has stated publicly that the public institutions of Massachusetts are corrupt, and corruption accepted as a way of life. He did not fully state the case, as he derived thereby a reason and necessity for the existence on the federal side of the office of United States Attorney.

There is every reason to include large portions of the federal jurisdiction within

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Massachusetts in the general rot. It is notable and in contrast to annotations in at least eight other circuits that in the First Circuit the two leading circuits-wide cases dealing with racketeering amongst the judiciary find no application. No public prosecutor within the jurisdiction of the First Circuit has ever brought a RICO complaint against a judicial figure or, with a single recent innovation, against a public official. But this is not the whole reason for the First Circuit's well documented resistance to Title IX (RICO) except for obvious italophagic applications.

It is a central contention of this petition that what the First Circuit Court has affirmed here is that, as a matter of high self-interest, it is better to share judicial immunity with criminal elements than to permit iotal application of 18 U.S.C. §§1961-1968 to 'judicial' conduct.

The record herein can be read in no other

way and is particularly unmistakable in the following intervals:

Pages 72-83.

Pages 46-71

which are to be contrasted with the First Circuit response at:

Pages 27-40.

What can be concluded from these exchanges (argument below) is that in its self-interested resistance to the will of Congress as expressed in 18 U.S.C. §§ 1961-1968, the First Circuit is in conflict with at least eight other circuits and has decided a federal question contrary to decisions of this Court by holding out a specious and untenable proposition, jurisdictional breach as precondition to judicial RICO liability, which this Court should settle. Rule 10.1(a),(c).

STATEMENT OF THE CASE

This matter and a related case awaiting trial in the United States District Court for Massachusetts (below) arose from attempts to remove this petitioner as trustee and beneficiary of an inter vivos trust and as executor of the settlor's will.

The petitioner had been a resident of Texas, where he was an exploration geologist for oil and gas, for more than thirty years, and a co-trustee with the donor, his mother, for nine years, of an inter vivos trust established under the laws of Massachusetts when the settlor died in December 1983 and he became sole trustee. Under provisions of the trust, two other beneficiaries were named successor trustees after him, to succeed in turn, each and all with the same powers. Each trustee was accorded liberal discretion. Article 7(A) of the trust also permitted each trustee to take a life estate, or for a shorter term, in the property of the trust.

A fourth beneficiary of the trust in equal

was not designated a successor trustee by the donor and, allied with Richard H. Liebman, the attorney defendant in this case, ultimately sought the removal of the petitioner as trustee and executor, and appointment of herself, in multiple suits brought in Middlesex Probate Court, Massachusetts.

Between the times of the establishment of the inter vivos trust in 1974 and the accession of this petitioner as sole trustee in 1983, the defendant Liebman was convicted in a state court of conspiracy in the armed robbery of a bank, was imprisoned for six years, and was readmitted to the bar among his equals.

One of Liebman's first acts as 'counsel' for the fourth beneficiary was to conspire the arrest of the trustee by police of the city of Everett, then to adduce the arrest in probate proceedings as evidence of unfitness. The petitioner was acquitted by a jury of the charge, disorderly conduct, but was declared removed from his positions of executor and

trustee by the 'probate court,' in fact Liebman's racketeering associates since, on evidence, at least nine years before this petitioner's own advent into their Star Chamber.[2]

Emboldened by their long success in carrying on a racket under the guise of the forms of law, the four probate judges who are defendants here operated openly. In the face of this, the petitioner was abandoned by two sets of lawyers who recognized their impotence at law, yet would not risk the ruin of their practice; and the petitioner took up his own case or series of cases, in thousands of hours spent educating himself in law.

No known right at law was left unbroken by

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2. A companion suit by the petitioner against the city of Everett, Mass., its police officers and Liebman awaits trial in the United States District Court for Massachusetts. It alleges false arrest and imprisonment in violation of 42 U.S.C. §§ 1981 et seq., abuse of process and malicious prosecution.

the judicial defendants here, including the right to present testimony, freedom from nunc pro tunc judgments intended to create entrapments to be operated by Liebman, open bribery later confirmed and implemented by court orders, obstacles to appeal and even selection of the issues of appeal from the trial court's own decrees. In his first amended complaint the petitioner eventually identified eighty-six §1961 RICO predicate act violations by the five defendants during a period of fifty months. Pages 99-176 herein, and in particular the summary at Exhibit "A" of the first amended complaint, pages 173-176.

Upon this presentation Judge David S. Nelson ordered discovery to proceed. Page 177.

When he received this case by reassignment, Judge A. David Mazzone allowed a 'motion' of Richard Liebman, without service on the petitioner, to 'join' a pending motion for dismissal of the complaint on grounds of absolute judicial immunity by the Massachusetts Attorney

STATEMENT OF THE CASE

General representing the judicial defendants. Once more Liebman walked away from federal liability.[3]

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3. Liebman's helpful connections with the United States District Court for Massachusetts await clarification. In 1975-1976 when three accomplices were given penetentiary terms of up to twenty years for the bank robbery, Liebman testified four times to a federal grand jury and was not indicted. His gunman and favorite accomplice was tried and acquittted in federal court when bait money seized by the FBI failed to be presented.

Liebman was convicted in December 1977 in Middlesex Superior Court only through the persistence of a renowned Boston police detective, John L. Ridlon. He appeared five times, although not for trial, before then Superior Court Judge A. David Mazzone, who omitted to disclose the connection in the present proceedings. Federal Judge Mazzone then denied this petitioner's motion for recusal.

The petitioner's gloss on the United States Attorney's statement about rampant public corruption in Massachusetts thus does not proceed from lyrical imagination. First Circuit aversion to the judicial application of RICO, may.

STATEMENT OF THE CASE

The special circumstances in which the petitioner appealed to the First Circuit from dismissal of his complaint merit mention. The First Circuit Court of Appeals had never considered the circuits-wide application of civil RICO liability to judicial defendants except marginally in a single case. This was Cok v. Cosentino, 876 F. 2d. 1 (1st Cir. 1989), where the First Circuit held that 'absolute judicial immunity' was never lost except for 'judicial' acts taken in complete absence of subject matter jurisdiction. This was not a consideration in prevailing decisions which were circuits-wide and had received indirect approval through the procedure of certiorari; e.g., United States v. Angelilli, 660 F. 2d. 23 (2d. Cir. 1981), cert. den. 455 U.S. 945; United States v. Vignola, 464 F. Supp. 1091 (E.D. PA 1979), aff'd. 605 F. 2d. 1199 (3rd. Cir.), cert. den. 444 U.S. 1072.

The precondition imposed by the First Circuit appeared illogical and unsupported by the preponderance of circuit views (eight) but

accorded favorably with the facts of this petitioner's case : He discerned seven instances in which the defendant judges of the Middlesex Probate Court acted, often rampantly, in obvious absence of both judicial capacity and of jurisdiction. Pages 46-71 herein. In one of these instances, the Massachusetts State Appeals Court had held for the petitioner against the defendant Judge Sullivan and had annulled his order to compel arbitration over demands for attorney fees as given in absence of jurisdiction. The order of the state Appeals Court is at page 96 herein.

In its strained opinion, pages 27-40 herein, the First Circuit denied that the judicial defendants ever acted without jurisdiction, and denied rehearing.

This petitioner therefore puts Question III, whether, met on its own self-circumscribed grounds, the opinion of the First Circuit Court of Appeals is, on the facts, an honest one.

ARGUMENT

The petitioner takes procedural guidance from Rule 10 of this Court in presenting the following reasons why the Court should grant review of the First Circuit judgment on writ of certiorari:

REASON 1.

The Court of Appeals for the First Circuit has rendered a decision in conflict with the decisions of eight other circuit courts of appeal, in that the First Circuit makes 'clear absence of subject matter jurisdiction' a precondition for a finding of RICO liability against judicial defendants. Rule 10.1(a).

The two prevailing circuits-wide cases which apply 18 U.S.C. §§ 1961 et seq. to predicate-act violations by judicial defendants and have received indirect approval of this Court through certiorari are United States v. Angelilli, 660 F. 2d. 23 (2d. Cir. 1981) and United States v. Vignola, 464 F. Supp. 1091 (E.D. PA 1979), aff'd. 605 F. 2d. 1199 (3rd. Cir.) as above. On recent inspection Angelilli had been cited and followed by five circuit courts of appeal; Vignola had

been cited and followed fifty-six times by the courts of appeal of eight other circuits. Neither case was once referred to by the First Circuit.

The cases treated by the eight other circuits contain no mention of the peculiar precondition interposed by the First Circuit before a finding of RICO liability against judicial defendants can be made. Moreover the reluctance of the First Circuit places it in a further logical difficulty, which is the question of equal/unequal prosecutorial requirements under §1964(b) and §1964(c) -- better treated, however, under Rule 10.1(c) below.

The closet of the First Circuit to preserve 'absolute judicial immunity' in its present opinion 'proceeds on the assumption that common-law principles of legislative and judicial immunity were incorporated into our judicial system...' Commendably, the idea is less hoary than Bradley v. Fisher, 13 Wall 335 (1872) on which the First Circuit otherwise so much relies for notions of judicial immunity.

But the authority borrowed [page 30 herein] is a mere musing in Pulliam v. Allen, 466 U.S. 522, 529 (1984), which goes on to hold quite differently (judicial immunity is not a bar to prospective injunctive relief against a judicial officer, nor to the award of attorney fees against him.)

Contrary to the First Circuit, the prevailing view of the preponderance of circuit courts follows Vignola as to the effect of RICO legislation on presumptions of judicial immunity:

> The court [in Vignola] stated that it rejected such contentions as being contrary to the plain language of 18 U.S.C. §1961(4), noting that the definition made no exception for public entities such as the judiciary, that there was no basis in the legislative history for implying such an exception, and that the RICO statute must be liberally construed to effectuate its remedial purposes.
> 52 ALR Fed. 828.

This Court should exercise its discretion through a writ of certiorari to end the reaction-

ary and conflictive stance of the First Circuit in this matter, for the special and important reason that the high self-interest of the circuit judges in 'absolute judicial immunity' is public and palpable, and vitiates badly needed judicial leadership in a jurisdiction deep in corruption.

REASON 2.

The Court of Appeals for the First Circuit in its opinion here has sanctioned so far a departure from the accepted and usual course of judicial procedure by the court below as to extend effective 'absolute judicial immunity' to a non-judicial figure also, who is an unpardoned felon, by the dismissal of a RICO complaint on grounds of judicial immunity. Rule 10.1(a).

The present case is not the first instance in which the First Circuit Court has strained its doctrine of 'absolute judicial immunity' beyond hope of acceptance. When it finds a court-appointed conservator and alleged bagman to possess "absolute quasi-judicial immunity," comic paralysis results. Cok v. Cosentino, 876 F. 2d. 1, 3 (1st Cir. 1989).

ARGUMENT

The petitioner's first amended complaint, reproduced in full herein, occupies some seventy-seven pages in the appendix. Four of ten counts (Counts Four, Five, Six, Ten) name the defendant attorney together and separately; and the tabulation, page 173 herein, identifies 39 of the 86 predicate act violations by the five named defendants to be his.

The district court, Mazzone, J., dismissing in a brief memorandum of surprising superficiality in which 'absolute judicial immunity' was keyed to different, permissive standards established by this Court for the application of civil rights law, dismissed as to all the defendants, without mention of the defendant attorney. Pages 42-45 herein.

When this petitioner challenged the omission on appeal as giving the fifth defendant a free ride on judicial immunity, astonishment replaced surprise. The First Circuit opinion affirming the dismissal volunteered fully a third of its length to a pro bono defense of the attorney.

Pages 35-40 herein. The excusing and intervention on behalf of the attorney defendant do not fall within the accepted and usual course of judicial procedure and cannot be countered here or without trial. Evidence at the petitioner's disposal overflows the capacity of the complaint stage, and the First Circuit invades the province of a jury.

This Court's discretion should allow trial to proceed, as was the conclusion of the first district judge to whom this case was assigned.

REASON 3.

The First Circuit has decided an important question of law which has not been, but should be, settled by this Court; in that the First Circuit presumes a different intent of Congress as to prosecutorial burden under §1964(c) than under §1964(b). Rule 10.1(c).

For reasons which need not be speculated here but are pragmatic, the First Circuit has

never had occasion to decide whether its rule of peculiar precondition in Cok v. Cosentino applies as well to civil RICO prosecutions brought under §1964(b); that is, whether an United States Attorney must also show that a RICO judicial defendant acted in clear absence of subject matter jurisdiction in order for liability to be found.

The First Circuit so held for 'any person injured in his business or property' bringing suit under §1964(c) in Cok v.Cosentino and so required of the present petitioner by its opinion, notwithstanding that it found the petitioner's facts in six instances and a finding of the Massachusetts Appeals Court in a seventh instance insufficient to establish 'clear absence of subject matter jurisdiction,' hence the loss of 'absolute judicial immunity' by the judicial defendants.

This petitioner maintains that the First Circuit has rendered an opinion against him which is manifestly dishonest as to both fact

and law; but, having done so, must apply the same standard to an United States Attorney bringing a RICO action under §1964(b) sometime soon; or in the alternative bring its moral suasion to bear on behalf of judicial defendants convicted in other jurisdictions by United States Attorneys proceeding under §1963 or under §1964(b) who have not shown that the judicial defendants acted in clear absence of subject matter jurisdiction.

In other words, this Court in its discretion should take account of the mischief created by the First Circuit even from a position of recalcitrance and non-participation, and should settle whether Congress intended a different prosecutorial standard under §1964(c) than under §1963 and §1964(b). The question is not hypothetical, because within First Circuit jurisdiction, italophagic prosecutions excepted, the only RICO movement originates under §1964(c).

ARGUMENT

REASON 4.

Moreover as to the above the First Circuit has decided a federal question in a way that conflicts with an applicable decision of this Court, which has indicated that §1964(c) contains "private attorney general provisions" not less empowering than those of an United States Attorney under §1964(b), because the intent of Congress in legislating §1964(c) was to fill prosecutorial gaps. Rule 10.1(c).

Seven years ago this Court had occasion to consider alleged limitations placed upon the operation of §1964(c) by alleged intent of Congress and held that Congress did not intend prior conviction as a precondition to liability found against private defendants in civil RICO actions. Sedima S.P.R.L. v. IMREX CO, 473 U. S. 479, 493 (1985). The Court stated:

> Private attorney general provisions such §1964(c) are in part designed to fill prosecutorial gaps. Cf. Reiter v. Sonotone Corp. 442 U.S. 330, 344, 60 L. Ed. 2d. 931, 99 S. Ct. 2326 (1979). This purpose would be largely defeated, and the need for treble damages as an incentive to

litigate unjustified if private suits could be maintained only against those already brought to justice. See also n 9, supra.

Sedima, 473 U.S. at 493.

The precondition unjustifiably interposed by the First Circuit if let stand goes much farther to defeat the congressional purpose of filling prosecutorial gaps. In our system judges are at the centers of power. The petitioner has particularized that racketeers who happen to be judges and lawyers have committed numerous predicate violations under the guise of the forms of law.

The proof of this must overcome the reasonable presumption that most judges are honest. But where this is palpably not the case, a private complainant under §1964(c) should no more be handicapped than a public prosecutor by a necessity of also finding what in most cases is not there : a breach of jurisdiction. Most crooked judges are smarter than those of Middlesex Probate Court, Massachusetts, where

in the event obvious and even adjudicated breaches of jurisdiction availed nothing with the First Circuit.[4]

This Court has good reason to expand its opinion in Sedima by certiorari to the First Circuit rejecting the precondition that a breach of jurisdiction need exist for a finding of liability against a judicial defendant in actions brought by a private complainant under §1964(c).

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4. There is no need except self-interest for such a complicated test. The present complaint assumes throughout that the most common judicial violation is a variety of fraud wrongly using a particular form of law, and that it is also the least concealable from the common sense of a jury. 'Did he give what he owed the public, the honest and faithful services of a judge, or act from another motive?' The question has powerful discernment, and Judge Weinstein's formulation has not yet received the use it merits. United States v. Brennan, 629 F. Supp. 283, 293 (E.D.N.Y. 1986). Brennan fraud is judicial fraud includable in §1961(1). The First Circuit opinion herein labors vainly against it.

CONCLUSION

The opinion of the First Circuit affirming dismissal by a district court of the petitioner's civil RICO complaint against four judicial defendants and an attorney invokes the preponderance of Rule 10 of this Court.

The First Circuit is in conflict with eight other circuits and with the clear direction of this Court when it denies applicability of the RICO statute to judges, and defeats recourse of private complainants to §1961(b) by interposing a burdensome and rare precondition which in practice it does not accept.

In the interest of brevity this petition omits the additional confusion the First Circuit has caused by introducing into the criminal and quasi-criminal area of RICO law, protections to judicial immunity which this Court permits in the altogether different, permissive application of civil rights law. This matter is treated nevertheless in the appendix herein at pages 76-78 herein after having been pleaded fruitlessly before the First Circuit Court.

CONCLUSION

The petitioner requests writ of certiorari to the First Circuit Court for reinstatement of his first amended complaint and remand for trial before a different district court judge.

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December 30, 1992

A P P E N D I X

OPINION OF THE FIRST CIRCUIT APPEALED FROM

[Not for Publication]

United States Court of Appeals for the First Circuit

No. 92-1168

C. D. Di Giambattista, Plaintiff, Appellant

v.

Sheila E. McGovern, J., Jeremiah J. Sullivan, J., William Highgas, Jr., J., Vincent F. Leahy, J. and Richard H. Liebman

Defendants, Appellees

Appeal from the United States District Court for the District of Massachusetts

[Hon. A. David Mazzone, U.S. District Judge]

Before

Breyer, Chief Judge; Campbell, Senior Circuit Judge; and Cyr, Circuit Judge.

C. D. Di Giambattista on brief pro se; Scott Harshbarger, Attorney General and Michelle A Kaczynski, Ass't. Attorney General, on brief for appellees.

September 4, 1992

OPINION OF THE FIRST CIRCUIT APPEALED FROM

Per Curiam. This appeal has its origin in a matter litigated several years ago in the Middlesex Probate Court in Massachusetts. The appellant, C. D. Di Giambattista, was the trustee of a revocable trust established under the laws of Massachusetts. The amended complaint contains only a sparse description of the state proceedings, but it appears that the beneficiaries of the trust, all Mr. Di Giambattista's siblings, sued in Probate Court to remove Mr. Di Giambattista as trustee and as executor of the settlor's estate. The proceedings were rancorous, and at one time or another involved four judges of the Probate Court: appellees McGovern, Sullivan, Leahy and Highgas. The beneficiaries were represented by Richard Liebman, who is also an appellee here.

In 1986 the Probate Court removed Mr. Di Giambattista as trustee and executor. The Massachusetts Appeals Court affirmed the judgment in June 1991. By then, Mr. Di Giambattista had already filed this lawsuit in the United States

District Court for the District of Massachusetts. He named Judges McGovern, Sullivan, Leahy and Highgas, and attorney Liebman, as defendants, and claimed that they had violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., by conducting the affairs of the Middlesex Probate Court through a "pattern of racketeering activity." At length, the district court dismissed the complaint. This appeal followed. We affirm.

The Judicial Defendants

The district court dismissed the claims against Judges McGovern Sullivan, Leahy and Highgas because each enjoyed absolute judicial immunity for the acts he or she is alleged to have committed. The doctrine of judicial immunity protects judges from "civil liability for any normal and routine judicial act." Cok v. Cosentino, 876 F. 2d. 1, 2 (1st Cir. 1989) (per curiam) (citing Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)). "Only judicial

actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity." Id. (citing Stump, 435 U.S. at 357).

Mr. Di Giambattista's principal contention on appeal is that Congress, in enacting the RICO statute, abrogated the traditional rule of judicial immunity. He supports his argument by citing cases in which courts have said that judges may be held criminally liable for violating RICO. See, e.g., United States v. Forsythe, 560 F. 2d. 1127 (3rd Cir. 1977); United States v. Vignola, 464 F. Supp. 1091 (E.D.Pa. 1979).

Federal courts "have proceeded on the assumption that common-law principles of legislative and judicial immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." Pulliam v. Allen, 466 U.S. 522, 529 (1984). Under the common law, judges are generally immune from civil liability for judicial acts, subject to the conditions

described above, but they do not enjoy immunity from criminal liability. See O'Shea v. Littleton, 414 U.S. 488, 503 (1974). Thus, the fact that judges have been criminally liable for violating RICO in no way suggests that Congress intended to give civil RICO plaintiffs a remedy not available to those who sue judges under the common law. And, as we see no other indication of Congressional intent, we decline to deprive these judges of the immunity to which they are generally entitled by settled legal principles.

Mr. Di Giambattista also contends that the judges here should not be protected by immunity because they acted in "the clear absence of all jurisdiction." The "scope of ... jurisdiction must be construed broadly where the issue is the immunity of the judge," Stump v. Sparkman, 435 U.S. at 356, and a judge will doff the cloak of immunity only when he conducts proceedings over which he lacks any semblance of jurisdiction. Thus, in a classic example offered by the Supreme Court 120 years ago,

"if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for [criminal] offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority." Bradley v. Fisher, 80 U.S. 335, 352 (1872). On the other hand, if a judge in a criminal court convicts a defendant of even a non-existent crime, he maintains his immunity, because "where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case..." Id.

None of the acts identified by Mr. Di Giambattista was actionably extra-judicial according to this standard. Massachusetts probate courts

have general equity jurisdiction, M.G.L. c. 215 §6, and the removal of a trustee or executor is an exercise of such equity jurisdiction. See, e.g., Gorman v. Stein, 1 Mass. App. Ct. 244 (1973). Thus, Judge Sullivan's rulings during the trial, whether or not correct, fell within his purview as a probate judge, and even Judge Highgas, though not the trial judge, did not act in the "clear absence of all jurisdiction" by hearing motions and issuing orders that affected the case, since "jurisdiction over the subject-matter [was] invested by law... in the court which he [held]." Bradley v. Fisher, 80 U.S. at 352.

Nor were the orders issued by Judge Sullivan and Judge Leahy after the entry of final judgment clearly beyond the judges' jurisdiction. Although, as Mr. Di Giambattista contends, the taking of an appeal after entry of final judgment may "oust" the trial court of jurisdiction under most circumstances, probate judges retain power to make post-judgment

rulings in equity cases because Massachusetts law expressly provides that an appeal of an [sic] probate court's equity decision "shall not suspend or stay proceedings under such order or decree pending the appeal." M.G.L. c. 215, § 23.

Similarly, Judge McGovern's order that Mr. Di Giambattista produce additional trial manuscripts before proceeding with his appeal was not clearly beyond the bounds of her jurisdiction as fixed by Massachusetts law. Probate appeals are governed by the Massachusetts Rules of Appellate Procedure. M.G.L. c. 215, § 10. Mass. R. App. P. 8(b) gives probate judges authority to require appellants to order additional portions of the transcript in appropriate cases, and this means that Judge McGovern, whether she acted rightly or wrongly, did not act in the "clear absence of all jurisdiction."

In sum, because the amended complaint failed to allege any actionable conduct committed outside the defendants' jurisdiction as probate

judges, we conclude that the district court correctly dismissed the claims against appellees McGovern, Sullivan, Leahy and Highgas.

Attorney Liebman

Attorney Liebman was not protected by judicial immunity, and the absence of a discussion of the viability of the claims against him in the district court's opinion led Mr. Di Giambattista to argue that "Liebman gets a free ride on judicial immunity." However, notwithstanding the district court's failure to justify independently its dismissal of the RICO claims against Liebman, we find it appropriate to affirm. A court of appeals "can affirm on any ground presented by the record," Acha v. United States, 910 F. 2d. 28, 30 (1st Cir. 1990), and our examination of the amended complaint convinces us that Mr. Di Giambattista failed to state a claim against Liebman upon which relief could have been granted.

In order to make out a civil RICO claim, a plaintiff must plead and prove that the defendant

committed, or agreed to commit, a "pattern of racketeering activity." 18 U.S.C. §§ 1962(a), (b), (c) and (d). "Racketeering activity" is defined precisely in 18 U.S.C. § 1961(1) to mean (A) any act involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in controlled substances that is a felony under state law, and (B) any one of several enumerated federal crimes. Mr. Di Giambattista says that Liebman committed predicate racketeering acts of fraud, bribery, extortion and obstruction of justice, but the facts alleged in his amended complaint fail to bear out these conclusionary charges.

Fraud - Mr. Di Giambattista alleged that Liebman committed four predicate acts of "fraud." However, while mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, constitute "racketeering activity," common-law fraud does not. Fleet Credit Corp. v. Sion, 893 F. 2d. 441 (1st Cir. 1990).[1] Only one of the four fraud

allegations contained any reference to the mails: it charged that Liebman had interfered with the delivery of the mail by causing a postal employee to intercept a summons sent by Mr. Di Giambattista, not that Liebman had used the mail in furtherance of a scheme to defraud. In statutory terms, Mr. Di Giambattista has accused Liebman not of mail fraud in violation of 18 U.S.C. § 1341, but of obstructing the mail in violation of 18 U.S.C. § 1701 -- a federal crime to be sure, but not "racketeering activity."

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1. For this reason, Mr. Di Giambattista failed to charge Judge Sullivan with committing a predicate crime when he alleged that the judge had made a false declaration to a federal district court in response to a civil rights complaint that Mr. Di Giambattista had brought against him, but failed to allege that the judge had accomplished this "fraud" through use of the wires or mails.

Bribery- the three paragraphs in the amended complaint alleging bribery concerned statements that Liebman made in court to Judges Leahy and McGovern. None contained any suggestion that Liebman gave, offered, or promised either judge anything of value. All therefore failed to allege an essential element of the crime of bribery as it is defined by both state law, M.G.L. c. 268, §§ 2(a) and 3(a), and federal law, 18 U.S.C. § 201(b).

Extortion - Mr. Di Giambattista identifies five paragraphs of his complaint as containing allegations of extortion, but without exception these paragraphs recounted demands which Liebman made during litigation. A threat to sue, even if groundless and made in bad faith, may be tortious under state law, but it is not extortion under federal law, see I. S. Joseph Co. v. J. Lauritzen A/S, 751 F. 2d. 265 (8th Cir. 1984), and we think the same distinction should be made with respect to demands made in the course of, or threats to continue or inten-

sify, ongoing litigation.

Obstruction of Justice - Finally, the RICO statute identifies five "obstruction of justice" offenses as predicate crimes: 18 U.S.C. §1503 (influencing officers or jurors of United States courts); 18 U.S.C. §1510 (obstructing investigations of federal crimes); 18 U.S.C. § 1511 (obstructing enforcement of state law with intent to facilitate an illegal gambling business); 18 U.S.C. § 1512 (tampering with a witness, victim or informant); and 18 U.S.C. § 1513 (retaliating against a witness, victim or informant). None of the several instances of "obstruction" alleged by Mr. Di Giambattista fit the definition of any of these crimes.[2]

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2. Mr. Di Giambattista also alleged that Liebman committed twenty-one acts of "conspiracy." Conspiracy, in and of itself, is not racketeering activity, although a conspiracy to commit a "pattern of racketeering activity" is a violation of the RICO statute. 18 U.S.C. §1962(d).

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Having surveyed the amended complaint, and finding that it failed to allege that Liebman committed, or agreed to commit, even a single predicate racketeering act, we conclude that the district court properly dismissed the RICO claims against Liebman as well.

Affirmed.

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2. (cont.) We assume that Mr. Di Giambattista meant to say in the conspiracy allegations that Liebman had agreed to commit, or perhaps aided and abetted the commission of, predicate acts undertaken by others. But with few exceptions, the acts "conspired to" were orders issued by the probate judges, none of which, in our opinion, even remotely resembles "racketeering activity" as the RICO statute defines that term.

JUDGMENT OF THE FIRST CIRCUIT APPEALED FROM

United States Court of Appeals

for the First Circuit

No. 92-1168

C. D. Di Giambattista, Plaintiff, Appellant

v.

Sheila E. McGovern et al., Defendants, Appellees

Judgment. Entered September 4, 1992

This cause came on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court.

MEMORANDUM AND ORDER OF DISTRICT COURT

United States District Court

District of Massachusetts

Civil Action No. 91-11140-MA [N]

C. D. Di Giambattista, Plaintiff

Vs.

Sheila E. McGovern, et al., Defendants

Memorandum and Order

Mazzone, D. J. January 6, 1992

This pro se plaintiff has filed a complaint, styled as a "Complaint for Racketeering", seeking treble damages from four judges of the Middlesex County Probate Court and an attorney. The genesis of this lawsuit, as well as another one pending before this Court is a quarrel[1] among family members over the administration of the "Theresa Di Giambattista Revocable Trust." See Pauline M. Johnson and others v. C. D. Di Giambattista, Mass. App. Ct. No. 89-P-925 (1991). Apparently, the plaintiff attri-

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1. C. D. Di Giambattista v. Michael Doherty et al., Civil Action No. 88-0795-MA [N].

butes his failure to prevail in earlier actions to a conspiracy among these various defendants. He charges they have committed bribery and extortion, and, further, in order to conceal their nefarious activities, they have compounded their misdeeds by interfering with the mails, obstruction of justice, and prosecution of the defendant for contempt of court. The judicial defendants have filed a single motion to dismiss and the one attorney defendant has filed a separate motion to dismiss. The plaintiff has filed opposition to these motions.

An extended discussion is not necessary. Despite the sweeping accusations of misdeeds and criminality committed by the alleged conspirators, the plaintiff has not alleged the criminal acts with any specificity, nor does he describe how any ruling or statement by the judicial defendants, in association with the attorney, amounts to the predicate acts necessary to a racketeering conspiracy. H. J. Inc. v. Northwestern Bell, 106 L. Ed. 2d. 195,

214 (1989). What this complaint boils down to is a history of a quarrel among siblings in which the plaintiff puts his slant on the events which were adverse to him. The plaintiff's pleadings are literally strewn with colloquialisms which are entertaining, but not helpful and which certainly do not provide the clear, concise statement of a claim to which a defendant can be required to respond.[2]

More central to the pending motions, it is clear that these judicial defendants are being sued because of their rulings and actions as judges. When acting as judges, they enjoy absolute immunity. Stump v. Sparkman, 435 U.S.

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2. Examples of the plaintiff's prose are: "We have heard this all before": "Kaczynski Uses a Crooked Barrel": "Posted: Kaczynski is No Straightshooter": "Post Card Justice: The Supreme Judicial Court, Wish you weren't here. Don't remind us."

350. 355-6 (1978); Pierson v. Ray, 286 U.S. 541 (1967). Nothing in this record shows these defendants acting beyond their judicial roles. Off hand comments or remarks by a judge in the course of a contentious and time-consuming litigation such as this has been which a party may resent or be offended by are not actionable per se. This record shows the trial and appeal were conducted properly. We are not required to go beyond that record and require the judicial defendants to account for their rulings to this plaintiff.

Accordingly, the motion to dismiss is allowed and the complaint is dismissed.

So ordered.

A. David Mazzone
United States District
Judge

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

SEVEN JURISDICTIONAL BREACHES

United States Court of Appeals

for the First Circuit

Civil Action No. 92-1168

March 30, 1992

C. D. Di Giambattista, Appellant, Plaintiff

v.

Sheila E. McGovern, J., Jeremiah J. Sullivan, J., William Highgas, Jr., J., Vincent-F. Leahy, J., and Richard H. Liebman, Appellees, Defendants

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Appellant's Principal Brief, Hearing on the Original Papers, in Appeal from Dismissal by the District Court, Mazzone, J., of Complaint for Racketeering Enterprise and Damages, Middlesex County (Mass.) Probate Court, 18 U.S.C. §§ 1961, 1962, 1964, 1965.

[pp. 36-50]

6. The Judicial Defendants Also Fail to Retain Immunity under the First Circuit's Wholly Pragmatic Test in Cok v. Cosentino.

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

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It should be apparent that all defenses borrowed from civil rights law to assert judicial immunity against damages in civil RICO cases must fail for at least two reasons. First, the Supreme Court has underscored that immunity is not complete even in civil actions arising from civil rights decisions. In Pierson v. Ray, 386 U.S. 547 (1967), the pre-RICO case so much relied on by the defendants here, the Supreme Court "found no indication of affirmative congressional intent to insulate judges from the reach of the remedy Congress provided in §1983." Pulliam v. Allen, 466 U.S. 522, 540, 80 L. Ed. 2d. 565, 578, 104 S. Ct. 1970 (1984) (judicial immunity is not a bar to prospective injunctive relief against a judicial officer nor to the award of attorney fees upon the award of such relief). Secondly, the Supreme Court intends functional analysis of immunity questions to apply to constitutional claims. Civil RICO predicate acts are by

definition criminal, even though their penalties are not. 'Functional' analysis of criminal behavior can lead only to absurdities indicating that the approach is mistaken.

In Cox v. Cosentino the First Circuit has suggested wholly on pragmatic grounds but without authority that judicial defendants in civil RICO actions may still avoid liability for acts taken without clear absence of subject matter jurisdiction or when the act was "judicial in nature," Cok v. Cosentino, 876 F. 2d. 1,2 (1989), neither of which that plaintiff happened to have pleaded.

The Trustee herein contends that neither is a necessary pleading to sustain a civil RICO complaint, and that no authority for carning an exception in this manner will be found in the intentions of Congress or in interpretations by the Supreme Court. After RICO, there can be only a bit of flotsam salvaged from Bradley v. Fisher.

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF: SEVEN JURISDICTIONAL BREACHES

But in the present case such a line of inquiry is useful because probative of the judicial defendants' exuberant criminal conduct having regard least of all for jurisdiction. In some instances their acts "judicial in nature" were additionally in violation of state law and are so noted in what follows. Where these violations are also state crimes, they may be enumerated with allegations of RICO predicate acts. United States v. Angelilli, 606 F. 2d. 23, 24 (1981). Section 904(b), Title IX, 84 Stat. 947 (nothing in this title shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided in this title).

6(1). Jeremiah J. Sullivan, J. April 4, 1986, Sixth Day of Trial. Interference with Trust in Complete Absence of Jurisdiction. [By the sixth day of trial the Trustee has successfully defended the Trust against an effort

to force sale of its real estate for one-third value. He has presented detailed fiduciary accounts independently confirmed by bank and tax records. Sullivan at the instance of Liebman orders trial to continue, and for the next seven days suppresses all evidence as to Article Seventh of the Trust. For seven days Liebman with asiatic cunning denigrates the Trustee to create pretexts to remove him.]

Courts may ostensibly examine trustee conduct in order to determine allegations of wrongdoing when these are brought. The issue after April 4, 1986 is whether courts may interfere with inter vivos trusts after it is plain that such allegations are unfounded. Furthermore, a legitimate court, as distinct from the racketeering enterprise herein, would have allowed essential evidence that a trustee acted wholly within his powers. Where the discretionary powers of trustees are concerned,

It is not a question of whether or not

> the court agrees with the trustee. The property belonged to the testator or settlor, and he has entrusted it to the discretion of the trustee. This rule prevails generally, although with some variations in degree, throughout the country.
>
> Newhall, Settlement of Estates and Fiduciary Law in Massachusetts, 4th ed., vol. 3, p. 210.

The Theresa Di Giambattista Trust named three trustees to act in sole succession, of whom the appellant Trustee is the first. Omitted from succession as a trustee was a fourth trust beneficiary, Pauline M. Johnson, who hired Richard Liebman and brought suit to remove the Trustee and to replace him by herself. The Trustee therefore has been put in the position of defending not only his own rights, but those of the next two trustees named to succeed him.

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF: SEVEN JURISDICTIONAL BREACHES

The inter vivos trust gave each of the three trustees broad discretionary powers in turn, including that in Article Seventh advanced before:

> In extension and not in limitation of the powers given the Trustee by law or under any other provisions of this instrument, the Trustees shall have the following powers, in each case to be exercised from time to time, in their uncontrolled discretion, without notice to any beneficiary and without order, leave or license of Court:
>
> A. To retain indefinitely any investment made by them and any property, real or personal, transferred to them by the Donor or any other person...

The present Trustee has consistently maintained that the Donor intended thereby for each of the three named trustees to exercise or not

to exercise, in turn, an option to take a life estate, or one for some lesser time, in the property of the trust. The present Trustee so chose to do. In Massachusetts the rule has long been that the discretionary power of the trustee, so long as he acts in good faith, is not subject to revision by any court. Wright v. Blinn, 225 Mass. 146, 148 (1916).

What a legitimate court may not do, neither may an illegitimate court nourishing racketeering enterprises, notwithstanding that such enterprises favor liquidation, rather than conservation, of trusts. The related RICO charges set out in the Trustee's original complaint and amended complaint are RICO judicial (Brennan) fraud, bribery and conspiracy.

6(2). Jeremiah J. Sullivan, J. May 15, 1986 Tenth Day of Trial. Creation of Retroactive Law (Ruling Nunc Pro Tunc) in Absence of Jurisdiction

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

SEVEN JURISDICTIONAL BREACHES

[Prior to trial two of the judicial defendants, Sullivan and McGovern, issued conflicting and ambiguous orders on different dates, May 13, 1985 and May 24, 1985, which might have prevented the Trustee from using accounts to pay trust or estate bills. On July 10, 1985 the judicial defendant McGovern ordered and approved a Second Stipulation of the parties permitting the Trustee to pay bills after first securing the approval of Richard Liebman. The Trustee did so for fifteen months. On May 15, 1986 on the tenth day of trial, now in Star Chamber, Judge Sullivan declared May 13th and May 24th the year before to be the same date. During the vanished interval, the Trustee had paid bills and made an advance to the trust fund for its legal defence.]

Judge Sullivan's act in Star Chamber is so extraordinary that only a Bill of Attainder can encompass it. This conduct is far beyond what is commonly understood as clear absence

of jurisdiction. It is conduct which the Constitution succinctly forbids even to Congress: No Bill of Attainder or ex post facto Law shall be passed. Article I, Section 9, Clause [3], USC. Liebman rushed upstairs to Judge Highgas with the news. See 6(3) below.

Long before adoption of the Constitution, ex post facto enactments were abhorred as the negation of law in our tradition; to the asiatic view, possibly not:

> It is manifest, that this Man had broke no Law; and you know, Sir, that where there is no Law, there can be no Transgression... The Law ever looks forward, but never backward; but if once we come to punish Men, by Vertue of Laws Ex post Facto, Farewel Magna Charta, and English Liberties, for no Man can ever be Safe, but may be punished for every Action he does by Laws made after-

wards.

New England Courant, No. 79 (January 1723)

It is beyond the power of any court to enter such [retrospective] orders, and they must be reversed. Diggs v. Diggs, 291 Mass. 399, 403 (1935). A judgment in clear usurpation of power is void, and a void judgment is from its inception a nullity without legal effect. Lubben v. Selective Service System Board No. 27, 453 F. 2d. 645, 649 (1st Cir. 1972).

Liebman's objective was a pretext to get against the Trustee and order of contempt on which to hang an attachment of real estate, and he got them (below). Possibly, Sullivan was manipulated, as Liebman had to go to Highgas for the actual orders (below). Sardonically, the event eventually turned and struck Sullivan back. He perjured himself in pleadings to the First Circuit Court (below). But that encouragement was also Liebman's (below).

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

SEVEN JURISDICTIONAL BREACHES

The related RICO charges set out in the Trustee's complaint and amended complaint are bribery, judicial (Brennan) fraud and conspiracy.

6(3). William Highgas, Jr., J. May 15, 1986. Three Orders Given in Clear Absence of All Subject Matter and Personal Jurisdiction and in a Nonjudicial Capacity.

[Unlike the judicial defendants Leahy and Mc Govern and unlike Judge Sullivan who conducted trial, prior to May 15, 1986 Judge Highgas had no connection with the Trustee's case even in pretrial proceedings. There was also physical isolation. Judge Sullivan used a court room in the basement, Judges Leahy and McGovern on the first floor. Judge Highgas had his court room and chambers on the third floor. As soon as he got from Judge Sullivan the ex post facto ruling which annihilated eleven sidereal cycles from the month of May of the year before, Liebman flew upstairs to Highgas and

and got three order ex parte against the Trustee, who was attending trial in Judge Sullivan's basement room. One was an order of contempt, a second an order of short notice to appear in answer, and the third was an ex parte attachment of the Trustee's rights in real estate of the Trust.]

The acts of the defendant Highgas were taken in clear absence of all subject matter jurisdiction and of personal jurisdiction over the Trustee, since it was Judge Sullivan who either claimed or had these, respectively. Moreover the defendant Highgas issued his orders in the absence of judicial capacity. The Fifth Circuit Court of Appeals has devised a four-part test necessary to determine that an act is a "normal judicial function" without which judicial immunity is lost. Harper v. Merckle, 638 F. 2d. 848 (5th Cir. 1981), cert. den. 454 U.S. 816 (1981). One test factor requires that the act be in a case then

pending before the judge. Obviously the case did not pend before Judge Highgas but was actively proceeding at that moment before another judge. Another requirement in Harper v. Merckle is that the visit to the judge in court room or chambers be made [by Liebman] in reference to the judge's judicial capacity over the case. Obviously, Judge Highgas had none. Superior officers of the trial court had assigned the case to Judge Sullivan on July 31, 1985. These two requirements serve to define the taking and offering of a bribe, repec-tively.

The related RICO charges set out in the Trustee's original complaint and amended com-plaint are judicial (Brennan) fraud, bribery and conspiracy.

6(4). Jeremiah J. Sullivan, J. May 4, 1987 and May 6, 1987. Two Orders Given in Clear Absence of Appellate Jurisdiction after Final Judgment and Notices of Appeal.

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

SEVEN JURISDICTIONAL BREACHES

[On January 9, 1987 the Trustee entered timely notice of appeal as of right from three orders of Judge Sullivan given ostensibly in final judgment. On May 4, 1987 Sullivan gave Liebman an ex parte attachment in the amount of $75,000 against the Trustee. On May 6, 1987 Sullivan gave an order requiring the Trustee to submit to arbitration with Epstein, King & Isselbacher, whom he had allowed to withdraw, over $34,000 the firm claimed from the Trustee in legal fees. Sullivan's own order in final judgment had awarded the firm $2,000. These two orders fundamentally altered the terms of 'final' judgment even as 'final' judgment lay before the state Appeals Court on proper appeal.]

After an appeal has been claimed and filed in the registry of probate, all pursuance of the act appealed from shall be stayed until determination by the supreme judicial or state appeals court. M.G.L. c. 215, §22. The suspension of decrees appealed from pending

appellate review is a broad principle not confined to judgments in probate. The taking of an appeal ousts the trial court of jurisdiction. While the appeal is pending, the trial court has no power to alter or vacate its judgment, and very limited power to make any other order or decree affecting rights of the parties. Lovret v. Seyfarth, 22 Cal. App. 3rd. 841 (1972). It should be noted that Sullivan's second order had nothing to do with the rights of a party, the Trustee, but with claims of his late lawyers, whom he had allowed to withdraw at the worst moment for preserving the Trustee's right to appeal. Above at pp. 3-4. [N.B. Not part of the present extract.] It is well settled that filing a notice of appeal from a district court's judgment vests jurisdiction over the case appealed in the court of appeals. Thereafter, the trial court has no power to modify its judgment without permission of the appellate tribunal. In Re

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

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Federal Facilities Realty Trust, 227 F. 2d. 651 (7th Cir. 1955).

Judge Sullivan's second order, that for arbitration, also usurped the authority of courts of general and superior jurisdiction, which alone have such power in Massachusetts. A probate court's power in arbitration is limited to the grant of authority to the fiduciary, at his initiative, to "compromise" claims against an estate. M.G.L. c. 251, §§ 13, 14. Sullivan in final orders had awarded Epstein, King & Isselbacher $2,000 from the 'estate,' in fact from the personal account of the Trustee. Under fee agreement, the firm's claims were against C. D. Di Giambattista personally. The racketeers intended to award Epstein, King & Isselbacher for their extensive silences during trial.

In June 1987 the state Appeals Court annulled Sullivan's order for arbitration as given in clear absence of jurisdiction. A

probate court is without jurisdiction to entertain proceedings in arbitration generally, jurisdiction over them being limited to the Superior Court. City of Lawrence v. Falzarano, 7 Mass. App. [illegible] 592 n. 2 (1979).

The relate[illegible]harges set out in the Trustee's original complaint and amended complaint are judicial (Brennan) fraud, bribery, conspiracy and obstruction of justice; the last because, as the Trustee described and Sullivan well knew, the attachment of property obviated the Trustee's only means of financing an appeal from Sullivan's orders.

6(4) (a) (b). Jeremiah J. Sullivan, J. May 4, 1987. Order Ex Parte for Attachment of Real Estate (a). Vincent F. Leahy, J. May 28, 1987. Order Affirming Attachment (b).

On May 28, 1987 after hearing argument, Judge Leahy denied the Trustee's motion for relief from attachment and allowed the possibility of sanctions in money, seconding

Liebman's motion, if the Trustee continued to seek relief in the courts.

In addition to their acts in absence of appellate jurisdiction by drastically revising 'final' judgment after notice of appeal, Sullivan and Leahy violated state law while issuing orders in pursuit of their common enterprise. However constitutionally dubious ex parte attachment, Massachusetts Rules 4.1 (f) (ii), (iii), (h) Civ. Proc. require an affidavit of 'clear or immediate danger' to circumvent the constitutional difficulty. The affidavit was given by Liebman and accepted by Sullivan and Leahy as a condition necessary to their orders ex parte. Liebman is a felon convicted and imprisoned for conspiracy in bank robbery who has never been pardoned. By operation of state law Liebman's testimony in affidavit or otherwise was not to be credited in May and June 1987 nor may be until December 1994. M. G. L. c. 233, §21. Sullivan and Leahy

perpetrated their RICO predicate violations whilst also violating state law through the crime of perjury. The state law violations are enumerable as RICO predicate acts. Section 904(b), Title IX and p. [49] above.

6(4) (c) Jeremiah J. Sullivan, J. July 26, 1988. False Declaration and Perjury to the First Circuit Court of Appeals Concerning Judicial Act Taken in Clear Absence of Subject Matter (Appellate) Jurisdiction.

The Trustee subsequently brought an action against Judge Sullivan in federal district court under 42 USC §§ 1983, 1988 and the Fourteenth Amendment for violation of due process and property rights in giving the ex parte attachment. Judge Nelson dismissed because he did not want to add to his workload. The Trustee appealed.

In pleadings under date July 26, 1988 Judge Sullivan as appellee made false declarations to the First Circuit Court of Appeals.

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

SEVEN JURISDICTIONAL BREACHES

"... plaintiff has failed to pay over to the court-appointed fiduciary some $30,000 ... Based upon this showing, and pursuant to Mass. R. Civ. P. 4.1(f), Judge Sullivan ... issued Findings and Ex Parte Order for...Attachment.. in the amount of $75,000..."

First, the Trustee under duress had paid over the $30,000 to the "court-appointed fiduciary" (actually an ex-employee of the court) on December 6, 1986 and Sullivan knew so from proceedings before him on December 11, 1986 which are in transcript.

Secondly, the attachment was given four months after the payment, not before. Elsewhere, Sullivan insinuates more directly than here that the attachment was a sanction given in response for some form of contempt. The obfuscation is borrowed from still other perjurious pleadings by Liebman in July 1987 in the state appeals court.

Sullivan himself never issued an order of

contempt against the Trustee. The contempt either referred to or insinuated is that by Highgas given illicitly in complete absence of jurisdiction and without judicial capacity [as given above.] Here the racketeers are entangled in their own web. (And the First Circuit Court of Appeals took no action when this false declaration was shown before. 88-1550.)

But suns continue to rise on established law. The charge of directly related false declaration may be added to counts of RICO conspiracy and obstruction of justice. United States v. Qaoud, 777 F. 2d. 1105, 1118 (6th Cir. 1985).

7. Sheila E. McGovern. May 24, 1989. June 22, 1989. Two Orders in Clear Absence of Appellate Jurisdiction Telling the Trustee What Parts of the Record He May Select for Appeal and What Properly Noticed Issues He May and May Not Appeal from Her Court.

[Five years before her death the Donor made a

gift to her son the Trustee, separate from funds she left for distribution out of her testamentary estate, through a joint bank account and agreement as to which there was considerable trial testimony. Four state Appeals Court decisions in other cases held that tax treatment was not dispositive of donative intent and did not disturb the presumption of gift by joint account. Tax treatment in fact wholly supported the Trustee's testimony. In final judgment Judge Sullivan declared that tax treatment disposed as he preferred to see it and ordered the Trustee to turn over his bank account. The Trustee did, and timely appealed.]

On May 24, 1989 Judge McGovern told the Trustee that he must produce transcript of the whole trial record or she would 'dismiss' his appeal, and that he must produce ten additional transcripts within three weeks or she would 'dismiss' his appeal, both as

Liebman urged.

The point is elementary. The appellant is allowed to select transcript supporting issues whose decision by the court aggrieves him, Rule 8(b)(1) M.R.A.P., without precluding a right of appellees to add transcript, idem.

McGovern's other order was more sinister and concerned the pot of gold within easy reach of the enterprise, as was thought. The Trustee had entered separate notices of appeal of three issues: from his removal as trustee, from his removal as executor, and from sequestration of his $30,000 bank account.

On June 22, 1989 McGovern told the Trustee with the support of Liebman that he could appeal the issues of removal to the Appeals Court, but not that of the bank account. (Tr. June 22, 1989, pp. 11-15). Then, plainly, she intended to dismiss the issue she 'allowed,' over the $30,000 bank account, because the Trustee could not produce ten more transcripts

within three weeks as ordered. The pot of gold would never pass from the hands of her enterprise under this projection, therefore.

McGovern was plainly in clear absence of subject matter jurisdiction and usurped the appellate jurisdictions of the Appeals Court and state Supreme Judicial Court. A person aggrieved by an order, judgment, decree or denial of a probate court may make timely appeal to the appeals court or supreme judicial court. M.G.L. c. 215, §9. M.G.L. c. 211A, §10. The powers of Massachusetts appeals courts include those to vacate, set aside or reverse any judgment, decree or order of a court properly before it for review. O'Connor v. City Manager of Medford, 7 Mass. App. 615, 617 n. 1 (1979).

The related RICO charges set out in the Trustee's original complaint and amended complaint are judicial (Brennan) fraud, bribery, extortion and obstruction of justice.

EXTRACT FROM APPELLANT'S PRINCIPAL BRIEF:

SEVEN JURISDICTIONAL BREACHES

CONCLUSION

A First Circuit decision has proposed clear absence of subject matter jurisdiction or of judicial capacity as a precondition to loss of judicial immunity to damages in civil RICO actions. The appellant Trustee believes this was not the intention of Congress, nor is a direction of the Supreme Court.

Nevertheless the judicial defendants herein did breach these proposed limits in pursuit of their racketeering enterprise, and their acts reached further to violate fundamental principles of our law. Under §1964(c) they are liable in damages to the Trustee. His allegations are many and persuasive. One district judge had ordered discovery, and another dismissed without addressing the amended complaint.

The First Circuit Court of Appeals should remand the Trustee's amended complaint for trial to a jury.

PETITION FOR INITIAL HEARING IN BANC

United States Court of Appeals

for the First Circuit

No. 92-1168

C. D. Di Giambattista, Plaintiff, Appellant

v.

Sheila E. McGovern, J., Jeremiah J. Sullivan, J., William Highgas, Jr., J., Vincent F. Leahy, J. and Richard H. Liebman, an Attorney,

Defendants, Appellees

Petition of Appellant Purs. F.R.A.P. 35, Loc. R. 35.1 for Initial Hearing in Banc

April 8, 1992

Appellant C. D. Di Giambattista petitions this Court pursuant to Rule 35 F.R.A.P., Loc. R. 35.1 for an initial hearing in banc of issues relating assertions of judicial immunity to liabilities under §1963, §1964 of Title IX (RICO), stating:

1. Four of the defendants in the complaint dismissed by the district court (by Mazzone, J.

but Nelson, J. in disagreement) are or were Massachusetts probate judges charged with Title IX (RICO) §1961 racketeering under §1964 who have pleaded judicial immunity. The element of self-interest either in the district court or in the court of review cannot be avoided. The issues could receive a more disinterested review by the full bench of this Court, whereas

2. The few cases to come before this Court for panel-by-panel review (italophagic cases brought by public prosecutors have been exceptions) have reached noticeably strained conclusions. Examples are [§1963 RICO]: "legitimate" is implied in the §1961 definition of "enterprise," United States v. Turkette, 632 F. 2d. 896 (1980), reversed; [§1964 RICO]: presence of even iotal jurisdiction creates immunity against predicate acts charged under §1964 and by necessary implication, below, also against any brought under §1963 by a public prosecutor, Cok v. Cosentino, 876 F. 2d. 1 (1st Cir. 1989).

3. The last result is in place because the First Circuit Court of Appeals has never reviewed a defense of judicial immunity in a §1963 case brought by a public prosecutor. Eight other circuits have concluded that such immunity no longer exists. In two cases the United States Supreme Court has supplied the same direction by denial of certiorari. United States v. Angelilli, 455 U.S. 945 (1981). United States v. Vignola, 444 U.S. 1072 (1979). (Br. 11, 35).

The Supreme Court has also made evident that by §1964(c) Congress intended to give individuals attorney-general powers in actions for civil damages. Sedima S.P.R.L. v. Imrex Co. 473 U.S. 479, 493 (1985) (Br. 20). To support the result in Cok v. Cosentino, the First Circuit Court of Appeals would be constrained to find that "clear absence of subject-matter jurisdiction" is no less a precondition for a public prosecutor to proceed under §1963 than for an individual to proceed under §1964, or

to show why not. Bad logic makes poor precedent.

4. This appellant contends that the precondition set by a panel in Cosentino was wholly pragmatic, caused by the considerable want that no public prosecutor has ever brought a §1963 action against a judicial figure within the jurisdiction of the First Circuit, and that the precondition was never contemplated by Congress nor was later allowed by the Supreme Court. (Br. 29). [While the Supreme Court denied certiorari in Cosentino, there an individual sought to maintain a prosecution under 18 U.S.C., §§ 241-242 and was held to lack standing. This appellant does not argue differently on that point. (Br. 20, 30).]

5. The present case has the notable difference where any 'precondition' is concerned that the four judicial defendants acted with exuberant indifference to subject matter while pursuing their racketeering enterprise in the guise of a 'Middlesex Probate Court' during a period estimated at fifteen years.

PETITION FOR INITIAL HEARING IN BANC

Much of the appellant's principal brief herein is addressed to this matter with Cosentino as a postulate, but primarily as probative material. (Br. 36-50).

The appellant contends that a showing of "clear absence of subject-matter jurisdiction" is not a precondition necessary to a §1963 or §1964 action; but where and if so held, is necessary in both.

6. As a procedural matter, each member of the First Circuit Court of Appeals now accepts the following formulation of a matter subject to unavoidable self-interest:

> " This [absolute immunity from civil liability for any normal and routine judicial act] applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceedings, or how malicious the motive. Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S. Ct. 496, 499-500, 88 L. Ed. 2d.

507 (1985). Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity."

Cox v. Cosentino, 876 F. 2d. 1, 2 (1989).

This is a monstrous statement. It is in total avoidance of Title IX (RICO) enacted in 1970. Moreover, taken at face value it is unsound.

Cleavinger is only restatement of a six-part test devised in Butz v. Economou, 438 U.S. 478 which was intended as a 'functional analysis' of judicial immunity in order to avoid appearances of unconstitutional conduct on the part of judges. Cosentino took a single test from Butz and with it created "absolute quasi-judicial immunity" for a defendant alleged to be a court's bagman. Application of 'functional analysis' to criminal judicial activity leads to absurdities which only demonstrate a mistaken approach (Br. 36), but remains present in a marginal consideration

of civil RICO, the only one known to this appellant in the First Circuit.

It should be an indicator of the first importance besides that in a jurisdiction within which no public prosecutor has ever brought a §1963 action against a judicial figure, the (f) test of Butz also fails signally : correctability on appeal in the state courts is conspicuously lacking. (Br. 34).

7. The major beneficiary of Judge Mazzone's dismissal herein is the defendant lawyer, an unpardoned felon convicted and imprisoned for the armed robbery of a bank. Richard H. Liebman leads the next defendant 39-20 in the number of RICO predicate violations alleged. Exhibit A, p. 2.

In appearance Judge Mazzone chose to share what remains of judicial immunity with criminals, rather than relinquish any of it. But that direction was already signaled in Cosentino. (Br. 35).

In conclusion, in banc review would advan-

tage this Court at least as much as the appellant. After the laughter subsided over his assertion as to the consort of record, all eyes in the Forum turned toward Caesar's husbands.

April 8, 1992

PETITION FOR INITIAL HEARING IN BANC
EXHIBIT A

Analysis of Ninety-three Civil RICO Predicate Act Violations, May 24, 1985 to July 21, 1989 Alleged by Plaintiff

B = Bribery E = Extortion

C = Conspiracy F = Fraud

O = Obstruction of Justice

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[14], [62]	....	C	.....	.....	C	....
[15], [63]	....	F	.....	.....	.....	.....
[15], [63]	....	C	.....	.....	C	....
[15],[26],[63]	.....	.....	F	.....	C	....
[15],[26],[63]	.....	.....	F	.....	C	....
[15],[26],[63]	.....	.....	F	.....	C	....
[15],[26],[63]	.....	.....	C	.....	C	....
[15],[26],[63]	.....	.....	C	.....	C	....
[15],[26],[63]	.....	.....	C	.....	C	....
[17]	....	F	.....	.....	F	....
[18]	....	F	.....	.....	F	....

EXHIBIT A CONT.

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[19]	....	F	.....		C	....
[19]	....	O	.....		C	....
[30][b]	.....			F	.....	
[30][b]	.....			C...	C....	
[30][c]	.....			C...	F	
[31]	.....			F	.....	
[31]	.....			C...	C	
[32]	.....			O ..	C	
[33]	.....			B ..	B....	
[37]	C.....				C	
[38]	F.....					
[38]	F					
[39]	O					
[40]	C				C	
[41]	F					

PETITION FOR INITIAL HEARING IN BANC
EXHIBIT A CONT.

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[41]	C					
[41]	C				C	
[42][a]	E				E	
[42][d]	E				E	
[43]	O					
[44]	F					
[45]	F					
[46]	B				B	
[47]	B				B	
[48]	F				C	
[48]	E				E	
[49]	F				C	
[49]	E				E	
[51]					O	
[52]					O	
[54]					O	
[55]	F	F	F	F		

PETITION FOR INITIAL HEARING IN BANC

EXHIBIT A CONT.

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[58]	....	F.....				
[58]	....	O.....			O..	O
[58]	....	C.....			C..	C
[59]	.....	F.....				
[59]	....	O.....			C...	C
[61]	.....				E....	
[64]	.....				O...	O
[65]	.....				F...	F
[65]	.....				O...	O
[65]	.....				C...	C
Subtotals	20	13	6	8	39	7

INITIAL HEARING IN BANC DENIED

United States Court of Appeals

for the First Circuit

No. 92-1168

C. D. Di Giambattista, Plaintiff, Appellant

v.

Sheila E. McGovern, J., Jeremiah J. Sullivan, J., William Highgas, Jr., J., Vincent F. Leahy, J., and Richard H. Liebman, an Attorney, Defendants, Appellees

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Before

Breyer, Chief Judge, Campbell, Senior Circuit Judge and Torruella, Selya and Cyr, Circuit Judges

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Order of Court

Entered April 17, 1992

The motion for initial hearing in banc is denied.

By the Court

EXTRACT FROM PETITION FOR REHEARING

United States Court of Appeals

for the First Circuit

Civil Action No. 92-1168

September 18, 1992

C. D. Di Giambattista, Plaintiff, Appellant,

Petitioner

v.

Sheila E. McGovern, J., Jeremiah J. Sullivan, J., William Highgas, Jr., J., Vincent F. Leahy, J., and Richard H. Liebman,

Defendants, Appellees

Appellant's Petition for Rehearing in Dismissal of Complaint by District Court, Mazzone, J.

[Pages 4-10 are extracted]

Points of Law or Fact which in the Opinion of the Petitioner the Court Has Overlooked or Misapprehended

The petitioner retiterates his view that absence of jurisdiction is not a pre-condition

to commission of a RICO predicate act by a judicial defendant. The First Circuit view is the opposite : above. The petitioner argues below that this Court misapprehends that absence of jurisdiction did exist, and why.

1. Two Acts of Judge Sullivan

Four months after this petitioner had timely appealed from the 'final judgment' of his court, the defendant Judge Sullivan issued two additional orders which adversely affected the rights and unadjudicated claims of the petitioner. Rules 54(b), 62(d) M.R.C.P.

The opinion of this Court misapprehends the applicable state law here [opinion, this appendix at p. 33]: §23 of M.G.L. c. 215 is overridden by other statutes: Judge Sullivan was without jurisdiction to issue further orders pending appeal:

> "It would appear that the blanket statement in the text [of Newhall, Settlement of Estates in Massachusetts, v. 2], that an appeal does not automatically

suspend the decree, is subject to a caveat. GL c 215, §23, cited as authority for the statement, apparently has been overridden by the amendment to GL c 215, §6, enacted by St 1973, c 1114, §63, approved on November 30, 1973 and effective on July 1, 1974.

"The amendment added the last sentence of the section, providing that, 'notwithstanding any contrary or inconsistent provisions of the General Laws, procedure in cases in the probate court within the jurisdiction granted by this section shall be governed by the Massachusetts Rules of Procedure.' (GL 215, §6 was again amended by St 1975, c 400, §55, approved July 2, 1975, effective July 1, 1975, but the last sentence was not changed.)

"Rule 62(d), in turn, provides that an appeal from a judgment automatically stays execution upon the judgment while the appeal is pending.

EXTRACT FROM PETITION FOR REHEARING

"Certainly the effective provisions should be read that, in accordance with the intent of the legislature and the judiciary to coordinate the statutes of the Commonwealth and the rules of the courts, consistency rather than conflict will result..."

Newhall, Settlement of Estates in Massachusetts, v. 2, §302, p. 312, n. 12 as found in Supplement for 1989, pp. 88-89.

The opinion of this Court therefore misapprehends the actual state of Massachusetts law as to the two acts of Judge Sullivan described, and they were taken in absence of jurisdiction. The petitioner requests that the Court revise its opinion to this extent.

2. A Finding of Absence of Jurisdiction by the State Appeals Court as to One of the Above Acts of Judge Sullivan

The opinion of this Court herein also overlooks that the State Appeals Court, Grant, J., annulled the order by Judge Sullivan which

was entered on May 6, 1987, four months after the petitioner had appealed from 'final judgment,' for the reason, as argued therein by the petitioner, that Judge Sullivan was without jurisdiction to enforce arbitration over attorney fees demanded by Epstein, King & Isselbacher. The petitioner made this point in his principal brief in 92-1168 before this Court at page 43 [therein]. Attached hereto as Exhibit B [and reproduced in this appendix] is the relevant order of annullment on June 18, 1987 by the State Appeals Court, Grant, J., in 87-0288.

The petitioner requests that this Court revise its opinion accordingly as to the act of Judge Sullivan on May 6, 1987.

3. The Opinion of this Court Overlooks and Misapprehends Current Definitions of RICO Fraud and to that Extent is Also in Conflict with Other Circuits

Petitioner accuses Judge Sullivan of false declaration and perjury in pleadings to the

federal district court in his own defense in 87-2562-N on November 18, 1987 and once again to the First Circuit Court of Appeals in 88-1550 on July 26, 1988. (See petitioner's motion as to this matter filed March 31, 1992 under Rule 10(e) F.R.A.P. for a corrected statement.)

In its unexampled defense of the non-judicial defendant and convicted felon Liebman in this case, the First Circuit opinion herein has this to say in margin concerning the false declarations of Judge Sullivan to the federal courts:

> "1. For this reason, Mr. Di Giambattista failed to charge Judge Sullivan with committing a predicate crime when he alleged that the judge made a false declaration to a federal district court [sic: overlooking that Judge Sullivan repeated his falsehoods in formal pleadings to the First Circuit] in response to a civil rights complaint that Mr. Di Giambattista had brought

against him, but failed to allege that the judge had accomplished this 'fraud' through use of the wires or mails."

[See **OPINION OF THE FIRST CIRCUIT APPEALED FROM** in this appendix at page 37 above.]

The 'omission' was not a 'failure' by petitioner, however, but a deliberate choice of law from examination of circuits which consistently score more often in the annotations of the accepted reporters of law. These hold reliance on the use of the wires or mails as a pre-condition to fraud under federal law, and in particular RICO law, to be overdone and picayune. The petitioner agreed, and in his brief relies for this point on United States v. Qaoud, 777 F. 2d. 1105 (6th Cir. 1985) and on United States v. Brennan, 629 F. Supp. 283 (E.D. N.Y. 1986). For Qaoud, Br. at p. 48.

In Qaoud a defendant charged (with a judge) of RICO violations by use of the mail to commit fraud, was separately charged with RICO fraud without use of the mail in giving false

responses to simple questions requiring answers only "yes" or "no," viva voce to a grand jury, and found guilty. It could be concluded that no less a standard could be required of a state judge of long experience, such as Judge Sullivan, in pleadings twice crafted for the federal courts, whether the use of mails were alleged or not.

In Qaoud, "The government's indictment precisely identified Callanan, Jr.'s falsehoods before the grand jury. The indictment listed simple questions to which Callanan answered 'yes' or 'no.'" Qaoud at 1114. In the Rule 10 (e) F.R.A.P. motion referred to above, this petitioner precisely identified Judge Sullivan's repeated false declarations by a transcript of proceedings in his own court, q. v.

Moreover, and contrary to the view of mailing under 18 U.S.C. §1341 taken by the present opinion at [page 37 of this appendix], an attempt to avoid prosecution is a jury question, and even where reliance for proof of

fraud is placed with this statute, the mailings do not have to contain fraudulent matter. United States v. Hopkins, 357 F. 2d. 14, 17 (6th Cir.), cert. den. 385 U.S. 858 (1966) : the original rule has been latitudinized to this extent.

Petitioner requests this Court to revise its opinion, in which the law relied on by the petitioner at p. 48 of his principal brief was evidently overlooked.

4. The Opinion of this Court Overlooks and Misapprehends the Fundamental Charge Against the Defendant Judge McGovern for an Act Taken June 22, 1989 in Complete Absence of Jurisdiction.

The fundamental charge which petitioner's complaint makes against the defendant Judge McGovern is overlooked entirely by the opinion of this Court and is never referred to. It is described at page 48 of the petitioner's principal brief herein: "McGovern's other order was more sinister..." and again in petitioner's

motion under Rule 10(e) F.R.A.P. "...for Correction of the Record [for the date when the predicate act was committed] as to an Act of Sheila E. McGovern." This motion was filed with the Clerk of the First Circuit Court on March 30, 1992 and entered the next day as the docket in this appeal shows.

The petitioner has alleged that in furtherance of the RICO enterprise in the Middlesex Probate Court of which she is First Judge, and with the double purpose of concealing the enterprise and of retaining control over more than $30,000 sequestered by her court from the petitioner, Judge McGovern told the petitioner that by her direction, he was not allowed to appeal the "equity issue" (double-talk throughout all these proceedings for 'thirty thousand dollars').

The correct date of this act of Judge McGovern is June 22, 1992, as the said motion for correction states. Petitioner attached to his motion a partial transcript in eight pages in

which Judge McGovern forbids him to appeal this issue, long since timely noticed for appeal to the State Appeals Court by the petitioner.

That a court may not dictate to an aggrieved litigant the issues which he may appeal from that court's own decision is a fundamental principle of our law for which no rebuttal is effective. Neither a trial court nor a court of review has jurisdiction over such subject matter. Br., 49.

Clearly, the present opinion of this Court has overlooked this elementary jurisdictional breach. Petitioner requests this Court to revise its opinion herein accordingly.

EXTRACT FROM PETITION FOR REHEARING

EXHIBIT B THEREIN

Commonwealth of Massachusetts

Appeals Court

No. 87-0288-CV

Middlesex, SS. June 1987

Stanley M. Epstein,

Epstein, King & Isselbacher

Pauline M. Johnson, Carl J. De John

Plaintiffs, Appellees

v.

C. D. Di Giambattista,

Petitioner, Defendant

Petition to a Single Justice from an Order of the Probate Court, Jeremiah J. Sullivan, J., Staying Distribution of a Beneficiary Share to Petitioner unless He Submits to Arbitration of Attorney Fees

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Order

The petition which was filed in this court

EXTRACT FROM PETITION FOR REHEARING

EXHIBIT B THEREIN

on June 1, 1987, came on for hearing this day and was argued by counsel for the plaintiffs and by the defendant pro se; whereupon, upon consideration thereof and of all the papers filed in this court, it is ordered that the injunctive order which was entered May 6, 1987, in the Probate Court for Middlesex County in the matter numbered 85E0116-G1 be, and the same hereby is, annulled.

By the Court (Grant, J.),

Warren L. Shields

Assistant Clerk

Entered June 18, 1987

PETITION FOR REHEARING, DENIED

United States Court of Appeals

for the First Circuit

No. 92-1168

C. D. Di Giambattista, Plaintiff, Appellant

v.

Sheila E. McGovern, et al.,

Defendants, Appellees

Before

Breyer, Chief Judge, Campbell, Senior Circuit

Judge and Cyr, Circuit Judge

Order of Court

Entered November 13, 1992

The petition for rehearing is denied.

By the Court.

FIRST AMENDED COMPLAINT

United States District Court

District of Massachusetts

Civil Action No. 91-11140-MA [N]

C. D. Di Giambattista

Plaintiff, Managing His Own Case

v.

Sheila E. McGovern, as she is First Judge of the Middlesex Probate Court, Massachusetts; Jeremiah J. Sullivan, J., formerly a Recall Judge of that court; William Highgas, Jr., J., formerly an Associate Judge of that court; Vincent J. Leahy, J., as he is an Associate Judge of that court; and Richard H. Liebman, an Attorney,

Defendants

First Amended Complaint, R. 15(a) F.R.C.P.

for

Racketeering 18 U.S.C. §§ 1961 et seq.

Filed August 20, 1991

[Amendments are confined to pages 40-53.]

FIRST AMENDED COMPLAINT

The plaintiff C. D. Di Giambattista is a private citizen and not the member of any bar. He manages his own case herein and alleges as follows:

NATURE OF THE ACTION

[1] The plaintiff alleges that between 1983 and the present and between about May 1985 and the present time the defendants have maintained an ongoing enterprise separate from the lawful business of the Middlesex Probate Court, before which interstate litigants also appear, by reason of which the defendants have interfered with the plaintiff's property and business advantages, namely a trust and bank account affecting interstate commerce.

[2] The defendants have maintained said ongoing enterprise openly under color of office employing the forms of law, but in fact through acts of extortion, bribery, fraud and conspiracy which constitute racketeering activities within the meaning of 18 U.S.C. §1961; and one of the defendants has stipulated with official

investigative commissions of the Commonwealth that the said open and ongoing activities have been detrimental to the public interest.

[3] The plaintiff alleges herein with particularity that each of the five defendants has perpetrated three or more acts of fraud, extortion, bribery or conspiracy to his injury, and that one of the defendants has stipulated to twenty-nine separate acts of bribery affecting others, all since 1983, wherefore the plaintiff alleges that these acts in total constitute a pattern of racketeering activity within the meaning of 18 U.S.C. §§ 1961(5) and 1962(c).

In particular all four judicial defendants have denied the plaintiff the honest and faithful service of judges, a fraud; or have conspired with the defendant attorney to extort from the plaintiff sums of between $30,000 and $50,000 by frauds constructed under the guise of the forms of law; and have attempted to extort from the plaintiff the renunciation of

rights inuring in Article 7(A) of a certain trust affecting interstate commerce; and have constructively accepted bribes from the defendant attorney which one or more of the judicial defendants then incorporated into orders under color of office, thereby also depriving the plaintiff of the services of honest and faithful judges.

The plaintiff further particularizes that the judicial defendants in order to conceal their unlawful activities have perpetrated fraud upon the United States District Court for Massachusetts in actions before that court.

The plaintiff additionally alleges and particularizes herein how the judicial defendants contrary to the lawful separation between courts and litigants have admitted the defendant attorney into the conduct if not primary direction of the Middlesex Probate Court in order to advance the common purpose of their racketeering activities, which was to redistribute the property of litigants

and estates among themselves under the guise of forms of law constituting a separate and fraudulent enterprise; and by way of illustration the plaintiff particularizes how one of the judicial defendants inducted said attorney to the rank and status of the court by adjudging the plaintiff in summary contempt of said attorney, who is a convicted felon, for an alleged affront to his honor and dignity.

These and other particularities herein support the plaintiff's allegations that the judicial defendants knowingly conspired with the attorney in violation of 18 U.S.C. §1962(d) for the purpose of violating 18 U.S.C. §§ 1962 (b), (c) in ways affecting interstate commerce.

The plaintiff further particularizes the knowing conspiracy of the judicial defendants by showing that on at least two occasions said defendants adopted and improved the attorney's schemes before giving them the guise of legal forms under color of office and in furtherance of the common enterprise, paragraphs [40] and

[72] below inter alia.

By his own testimony the defendant attorney has estimated with particularity, as this plaintiff is prepared to show, that the spoils available to the defendants for redistribution through their common scheme was $209,000. Therefore the plaintiff adopts that sum herein as one unit of the measure of damages he seeks from the defendants.

The plaintiff also particularly describes herein in support of his allegations of conspiracy contrary to 18 U.S.C. §1962(d) the defendant attorney's statement of his ability to fix a complaint should it reach the United States District Court. In the past he has done so, and escaped a charge of armed bank robbery of which he was subsequently convicted in a court of the Commonwealth.

Wherefore the plaintiff iterates in conclusion of this paragraph [3] that this complaint states a cause of action with sufficient particularity for conspiracy and other viola-

tions under 18 U.S.C. § 1962(d).

JURISDICTION AND VENUE

[4] This is an action for damages and other appropriate relief arising under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced and Organized Crime Act (RICO).

[5] This Court has jurisdiction in this matter pursuant to 18 U.S.C. §1964.

[6] Venue lies in this Court pursuant to provisions of 18 U.S.C. §1965.

THE PARTIES

THE PLAINTIFF

[7] The plaintiff C. D. Di Giambattista was a consulting petroleum geologist in Texas and the Southwest for many years and from January 16, 1974 to December 15, 1983 was co-trustee with the donor of the Theresa Di Giambattista Revocable Trust, the affairs and business of which he co-directed from his domicile in Texas, thereby affecting interstate commerce. The said trust was established by the donor in Middlesex County under the laws

of the Commonwealth of Massachusetts.

[8] On December 15, 1983 the plaintiff became sole trustee upon the death of the donor and pursuant to Article 7(A) of the trust also received an option to take a life estate in its corpus.

[9] The Theresa Di Giambattista Revocable Trust by its provisions and circumstances was at all times an enterprise within the meanings of 18 U.S.C. §1961(b) and 18 U.S.C. §§ 1962 (b), (c) the activities of which affected, and do affect, interstate commerce.

[10] In October 1984 the plaintiff paid to Neptune Worldwide Moving several thousand dollars to transport goods and records from Texas to Massachusetts in order that plaintiff defend the said trust in his capacity of trustee against suit brought against the trust. Neptune Worldwide Moving is a company engaged in interstate commerce under regulations of the Interstate Commerce Commission and applicable federal law.

FIRST AMENDED COMPLAINT

From about May 1985 the defendants herein have interfered with the Theresa Di Giambattista Revocable Trust in violation of 18 U.S.C. §§ 1961 et seq.

THE PARTIES: THE DEFENDANTS AND THEIR ACTS

A. THE DEFENDANT JEREMIAH J. SULLIVAN

[11] At the times relevant to this action the defendant Jeremiah J. Sullivan was a recall judge assigned to the Middlesex Probate Court in the Commonwealth of Massachusetts. Interstate litigants, not limited to the present plaintiff, appear before that court, which also purchases goods and services from business entities engaged in interstate commerce, wherefore the Middlesex Probate Court is an enterprise the activities of which affect interstate commerce within the meaning of 18 U.S.C. §1961(b) and 18 U.S.C. §§1962(b),(c).

[12] On thirteen days beginning March 25, 1986 and ending June 10, 1986 the defendant Jeremiah J. Sullivan in his capacity of a trial judge of the court conducted trial of five

cases in all of which the present plaintiff was the defendant personally and in his capacity of trustee and executor of the the will of the donor.

These cases were No. 84-P0619-E1, No. 84-P0619-E2, No. 84-P0619-T1 and No. 85-P0619-G1, all entered in Middlesex Probate Court; and No. 85-2295 entered in Middlesex Superior Court and transferred on the pretext of economy. But see [57] below.

On September 4, 1986 the defendant Sullivan entered findings and what purported to be 'final' judgment and orders in all five cases. One order awarded attorneys of all sides fees of $500, $2,000 and $2,000 respectively.

[13] Prior to trial the defendant Sullivan at the behest of the defendant Richard H. Liebman on May 24, 1985 issued an order restraining this plaintiff from the use of a personal bank account held in his sole name in due course of banking practice under state law. This plaintiff had made the last previous transaction

on May 20, 1985.

[14] On the sixth day of trial April 4, 1986 at the behest of the defendant Richard H. Liebman, the defendant Sullivan denied the motion of the trustee, this plaintiff, to appoint an independent administrator, then tried the trustee for six additional days to remove him, and removed him

[15] On the tenth day of trial the defendant Sullivan ruled that his order of May 24, 1985 in [13] and another order issued by the defendant Sheila E. McGovern on May 13, 1985 had issued on the same date, the earlier one.

[16] After the conclusion of trial, in an order issued with findings and 'final' judgment on September 4, 1986 the defendant Sullivan ordered this plaintiff to transfer to an administrator appointed by the defendant Sullivan the contents of the plaintiff's bank account in [13] above, then over $30,000.

[17] On May 4, 1987 subsequent to 'final' judgment the defendant Sullivan at the behest

of the defendant Liebman issued an ex parte attachment in the amount of $75,000 without prior notice against the real property of this plaintiff.

[18] On May 6, 1987 subsequent to 'final' judgment the defendant Sullivan at the behest of the defendant Liebman ordered this plaintiff to submit to arbitration for attorney fees in the amount of $33,000 claimed by his former counsel Anne J. White and the firm Epstein, King & Isselbacher whom the defendant Sullivan had allowed to withdraw at the conclusion of trial.

The order of the defendant Sullivan was subsequently annulled by the state Appeals Court as having been given without jurisdiction.

[19] The defendant Jeremiah J. Sullivan became a defendant in No. 87-2562-N brought by this plaintiff in United States District Court on a complaint of deprivation of rights in real property without procedural due process.

On November 18, 1987 the defendant Sullivan

and the defendant Liebman, the last not a party in No. 87-2562-N, represented to the United States District Court that on December 6, 1987 this plaintiff had not transferred to the administrator d.b.n. appointed to the defendant Sullivan the amount $30,546.35 at the Everett Co-operative Bank in the presence of bank officers, the administrator William F. Crowley and this plaintiff's attorney Paul A. Delory; and the defendants herein Sullivan and Liebman further represented to the United States District Court that the said administrator Crowley and the said attorney Delory did not testify that the transaction occurred, in a hearing before the defendant Sullivan in which the defendant Liebman participated on December 11, 1986.

THE PARTIES: THE DEFENDANTS AND THEIR ACTS

B. THE DEFENDANT WILLIAM HIGHGAS, JR.

[20] The defendant herein William Highgas, Jr. was an associate judge of Middlesex Probate Court from about January 6, 1983 until Septem-

ber 30, 1987. This period includes that during which were tried the five cases against the present plaintiff described in [12] above.

[21] The defendant Highgas at no time was assigned the said cases for trial and had no authority or jurisdiction over the cases during the period March 25-June 10, 1986 in which they were tried by the defendant Sullivan. The defendant Highgas also had not presided over any pre-trial hearings in the said five cases.

[22] On November 11, 1986 the Boston Globe alleged that as an associate justice of Middlesex Probate Court the defendant Highgas had appointed the same attorney guardian ad litem a disproportionate number of times, twenty-seven in return for favors including the transfer of real estate.

[23] On December 9, 1989 the Commission on Judicial Conduct of the Commonwealth of Massachusetts filed a complaint against the defendant Highgas and on March 25, 1988 as the result of an investigation issued formal

charges against the defendant Highgas of violations of Canons 2, 2(A), 3(B), 5(C)(1), 5(C)(4) and 6 of Rule 3:09 Code of Judicial Conduct promulgated by the Supreme Judicial Court.

Findings of the Commission included improper financial and business deals with, and accepting interest-free loans from, an attorney practicing in his court, Anthony J. Rizzo, otherwise with no connection to the present case, whom the defendant had appointed guardian ad litem twenty-eight times and master once in the period November 2, 1983 to August 1, 1986 from which the attorney had received fees of above $22,750 when in the same period the defendant had made 242 guardian ad litem appointments to 117 attorneys and none other had received as many.

[24] The States Ethics Commission of the Commonwealth conducted a separate investigation of Judge Highgas. In September 1987 he signed a stipulation with the Ethics Commission stating that his conduct as a judge of the

Middlesex Probate Court had been "detrimental to the public interest." The Ethics Commission imposed a fine of $1,500.

[25] As the result of the investigation by the Commission on Judicial Conduct, on December 7, 1988 the Supreme Judicial Court of Massachusetts issued an order of public censure against the defendant Highgas herein, in No. 4976. The defendant Highgas herein was reassigned from judge in Middlesex Probate Court to another court effective about the end of September 1987.

[26] On May 15, 1986 the tenth day of trial of the cases against the present plaintiff in Middlesex Probate Court, while trial was being conducted by the defendant Sullivan, the defendant Highgas issued three orders against the

present plaintiff at the behest of the defendant Liebman. One was an order and summons for contempt based on Liebman's allegations in orders described in [13] above and in [36] below. A second order was for short notice of the order of contempt uppn this plaintiff.

[27] On the same date May 15, 1986 the defendant Highgas at the behest of the defendant Liebman issued an ex parte order of attachment without prior notice against the real estate of the present plaintiff.

THE PARTIES: THE DEFENDANT AND THEIR ACTS

C. THE DEFENDANT VINCENT F. LEAHY

[28] The defendant Vincent F. Leahy is an associate judge of the Middlesex Probate Court to the present time and during all the events described in the present complaint.

[29] The defendant Leahy did not try any part of the five cases against this present plaintiff enumerated in [12] above.

[30] Previous to trial of the cases before the defendant Sullivan, the defendant Leahy heard motions and entered three orders in the cases. The stipulations, motions and orders appear as papers 20, 21, 22, 23 and 24 in the docket of case number 85-E0116-G and are further described as follows:

[a] On June 20, 1985 the defendant Leahy ordered compliance with a stipulation entered into on June 18, 1985 between the defendant Liebman and Ann J. White, then-attorney for the trustee and present plaintiff. The stipulation allowed the trustee to pay certain bills notwithstanding temporary orders which restrained him in his fiduciary capacity.

[b] On June 24, 1985 the defendant Leahy revoked his order in [a] on ex parte motion of the defendant Liebman, thereby undermining the stipulation.

[c] On June 24, 1985 in ex parte session the defendant Leahy allowed another motion by

the defendant Liebman. This was to continue temporary restraining orders. An assent thereto appeared on Liebman's motion. One of the signatures was forged. Subsequently, during trial and after, the defendant Liebman used the stipulation he had secretly undermined to charge this plaintiff with contempt of court, [60] below.

[31] On May 28, 1987 after the entry of 'final' judgment and the post-trial order for ex parte attachment by the defendant Sullivan, the defendant Leahy heard this plaintiff argue, managing his own case, for dissolution of the attachment as illegally and unconstitutionally given. Liebman was present. The defendant Leahy ruled it no illegality that Liebman, a convicted felon, presented his affidavit as valid and credible as required for ex parte attachment by Rule 4.1(f) M.R.C.P.

The defendant Leahy ruled in addition that ex parte attachment of real estate without prior notice was legal and constitutional.

[32] At the same hearing before the defendant Leahy on May 28, 1987 the defendant Liebman argued a motion for 'sanctions, costs and legal fees' against the present plaintiff. The defendant denied the motion but without prejudice.

The defendant Leahy thereby issued a continuing threat of sanctions against this plaintiff should he again seek relief in court from fraudulent interference with business and property affecting interstate commerce.

[33] On September 19, 1989 the defendant Leahy presided in a hearing on motion of the present plaintiff to correct the record on appeal. At the conclusion of the hearing the defendant Liebman said to the defendant Leahy sitting as a judge of the Middlesex Probate Court:

> "You stop him here, and I'll try to stop him in federal court, all right? I think I can."

The defendant Leahy made no objection.

FIRST AMENDED COMPLAINT

THE PARTIES: THE DEFENDANTS AND THEIR ACTS

D. THE DEFENDANT SHEILA E. MC GOVERN

[34] The defendant Sheila E. Mc Govern is first judge of the Middlesex Probate Court to the present time and during all events pertaining to this plaintiff described in this complaint.

[35] The defendant Mc Govern did not try any part of the five cases against this plaintiff enumerated in [12] above.

[36] On May 13, 1985 previous to the trial, the defendant Mc Govern as first judge presided over a hearin in Middlesex Probate Court , before which interstate litigants appear from time to time. At the behest of the defendant Liebman the defendant Mc Govern issued an order restraining the trustee, who is this plaintiff, from exercising control in his fiduciary capacity over assets belonging to the trust.

[37] On July 10, 1985 prior to trial the defendant Mc Govern presiding over a hearing

of the parties in the five cases against this plaintiff directed the parties to enter into a stipulation to permit the trustee, this plaintiff, to receive income and pay bills of the trust after giving the adverse parties and Richard Liebman prior notice.

The parties did so, and on fifteen or more occasions usually at monthly intervals the trustee observed the stipulated procedure.

During trial the defendant Liebman denied his participation in the stipulation of July 10, 1985 and charged the trustee with violation of restraining orders and with contempt. As first judge of Middlesex Probate Court the defendant Mc Govern entered no objection.

[38] In the year 1989 beginning thirty-two months after 'final' judgment by the defendant Sullivan in the probate trial, the defendant Mc Govern presided over four hearings between May 9, 1989 and July 21, 1989 on a motion by the defendant Liebman to dismiss the appeal of the trustee, the present plaintiff, to the

Appeals Court of the Commonwealth 'for lack of prosecution.'

This plaintiff managed his own case, triggering episodes of transient judicial dysphasia when this plaintiff attempted to show that he had taken three interlocutory appeals to the Appeals Court, and episodes of transient judicial dyslexia when Judge Mc Govern was unable to read a summary page showing that the plaintiff's production of transcripts was being interfered with.

[39] At a hearing on May 22, 1989 on the motion of the defendant Liebman to dismiss plaintiff's appeal, the defendant Mc Govern purported empowerment to strike two of the plaintiff's issues of appeal and to proceed on one alone, although this plaintiff had timely served notice of appeal of all three issues on January 9, 1987.

[40] The effect of such arbitrary 'treatment,' her term, was to place within the presumed power of the defendant Mc Govern the

dismissal of this plaintiff's appeal in the 'equity' case, No. 85-E0116-G, involving owenership of a bank account in the amount of $30,546.35 with interest from December 8, 1986 and in the hands of the administrator d.b.n., [16] and [19] above.

[41] On May 24, 1991 also an anniversary date in this matter on other grounds, [13] above, the defendant Mc Govern in the mistaken belief that complete transcript coverage of trial proceedings are necessary for assembly of the record on appeal, ordered this plaintiff to have produced ten additional transcripts in 23 days on pain of having his appeal dismissed 'for lack of prosecution.'

Except that under Rule 8(B)(1) M.R.A.P. the defendant Mc Govern was in error and selection of transcript is permissible to an appellant, the effect of said ruling would have been the appearance that the plaintiff's appeal had failed through his own act and not dismissed by the hand of the defendant Mc Govern

herself acting at the behest of Liebman.

[42] On the afternoon of June 26, 1989 this plaintiff chanced to be in the Middlesex County Probate Courthouse without any scheduled appearance in order to file a motion with notice of service under the ordinary rule, when he chanced upon the defendant Mc Govern in process of finding the necessary file. Judge Mc Govern detained the plaintiff and immediately phoned the defendant Liebman from the bench. Thereupon:

[a] In a lengthy conversation with Liebman the defendant Mc Govern transmitted a demand from Liebman as the condition of ending opposition to the plaintiff's appeal. As a technical and legal matter the demand required the plaintiff to make an affirmative renunciation of an overriding power given to the trustee by Article 7(A) of the trust, the same for which the defendants Sullivan and Liebman and attorney Anne J. White had suppressed testimony during trial.

[b] The plaintiff refused Liebman's demand or deal.

[c] "He says it's extortion," said the defendant Mc Govern to the defendant Liebman. She smirked.

[d] At the demand of Liebman, without agenda or stated purpose, the defendant Mc Govern ordered a hearing for the next morning.

[43] On June 27, 1989 the next morning, the defendant Mc Govern denied this plaintiff's motion for a continuance when he discovered that at her order a court reporter for whom he had arranged would not appear.

[44] During the overnight hearing on June 27, 1989 the defendant Mc Govern in her capacity of first judge of the Middlesex Probate Court adjudged this plaintiff in summary contempt for alleged offense of 'raising your voice at me,' revised to 'yelling' in a subsequent written order.

[45] During the overnight hearing on June 27, 1989 the defendant Mc Govern adjudged

this plaintiff in summary contempt a second time when, in response to her direct question the defendant identified the defendant Liebman as a drug addict.

[46] During the overnight hearing on June 27, 1989 the defendant Liebman suffered a recurrent attack of logorrhea but remained on his feet. Over the length of seventeen transcript pages he showed in detail that the defendants herein collectively had a total claim of $209,000 against this plaintiff, Liebman's clients and the corpus of the estate.

The defendant Mc Govern bade him to continue.

[47] During the overnight hearing on June 27, 1989 the defendant Liebman stated to the defendant Mc Govern in her capacity of first judge of the Middlesex Probate Court that if this plaintiff were found in contempt of the said court he, Liebman, expected to receive counsel fees therefrom of between $20,000 and $50,000.

[48] During a subsequent hearing of July 21, 1989 on Liebman's motion to dismiss the appeal the defendant Mc Govern, presiding, informed this plaintiff in her capacity of first judge of the Middlesex Probate Court of her intention to appoint a guardian ad litem to prosecute him for contempt of court.

THE PARTIES: THE DEFENDANTS AND THEIR ACTS

E. THE DEFENDANT RICHARD H. LIEBMAN

[50] The defendant Richard H. Liebman is at present an attorney before the bar of Massachusetts. He was admitted to practice in 1963, suspended in December 1977 and was reinstated in March 1983.

Liebman has represented two, and at times all, the plaintiffs in the five suits brought against this plaintiff as trustee and executor

[51] In these actions Liebman has at times introduced issues and motions directed against this plaintiff in which Liebman was himself plaintiff and complainant, as in July 1985 in a motion for the mental examination of the

trustee, this plaintiff, when the trustee had filed a complaint against Liebman with the Board of Bar Overseers.

[52] As late as March 14, 1991 in oral argument before the Appeals Court of the Commonwealth, the defendant Liebman has not overcome this plaintiff's contention that for all purposes, including the charge of barratry, Liebman is himself the actual complainant party-in-interest in the five actions brought against this plaintiff since May 1985.

[53] Liebman's record as an 'attorney' is that of satanism in the guise of the forms of law.

On December 12, 1977 he was convicted in No. 77-2604, Middlesex Superior Court, of conspiracy to commit the masked armed robbery of the Newton-Waltham Bank and Trust Co. in February 1975.

In the interval, in proceedings in this United States District Court, he had informed on petty criminals whom he directed, also his

'clients,' and had avoided prosecution. His 'clients' had received sentences of ten and twenty years in federal prison.

Upon conviction in the state court, Liebman was sentenced to between seven and ten years in Walpole, which he served.

[54] The defendant Liebman has never received a pardon nor rehabilitation from civil disability for the crime of which he was convicted. Consequently the testimony, argument, pleadings, affidavits and all sworn statements of the defendant Liebman have been without credibility throughout the events herein described, pursuant to statute, MGL c. 233, §21, ¶3, Conviction of Crime May Be Shown to Affect Credibility.

Pursuant to statute, Liebman's civil liability continues until December 7, 1994 and was in effect throughout his proceedings against this plaintiff.

[55] All four judicial defendants, who are Sheila E. Mc Govern, Jeremiah J. Sullivan,

William Highgas, Jr. and Vincent F. Leahy, nevertheless accepted and used the voided testimony of a convicted felon, Richard Liebman, against this plaintiff, including the affidavit required under Rule 4.1(f) M.R.C.P. for the ex parte attachment of this plaintiff's real estate and business advantages.

By established federal law the four judicial defendants thereby committed multiple frauds against this plaintiff by denying him the honest and faithful services of judges, and used such frauds to interfere with this plaintiff's business affecting interstate commerce within the meaning of 18 U.S.C. §1962 (b), (c).

[56] The defendant Liebman's connection with the defendant Sullivan preceded to year 1980. Richard H. Liebman and Jereniah J. Sullivan, Jr., the defendant's son, were students and near contemporaries of the same law school.

Months apart in the year 1977 in dis-

ciplinary proceedings similar to those brought against Liebman, the younger Sullivan was suspended from the bar June 18, 1977 in a case involving conversion of $12,000 belonging to the estate of a client, and other; and subsequently disbarred. SJC No. 77-14, 1 Mass. Atty. Discipline Reports 279.

[57] Early in 1985 the defendant Liebman shopped for a judge for his five cases against this plaintiff. The defendant Sullivan told Liebman he was willing to give a hand if Liebman would make a show of using the proper forms of law to bring the cases within his power. Liebman so did.

[58] Thereafter Liebman effectively conducted the affairs of the Middlesex Probate Court in the cases directed against this plaintiff. The defendant Sullivan, nominally the judge in charge of the trial, did largely what he was told, with occasional rebellion.

Anne J. White, then attorney for this plaintiff, knew from sessions in chambers

that a fix was on, but did not inform her client. She omitted presenting her client's strongest defenses against the charges in Liebman's suits.

Less than midway through the trial she transmitted a message from the defendant Sullivan inspired by the defendant Liebman: "People who criticize lawyers in my courtroom will not be heard themselves." "Ummmm," said Snow White, glancing meaningfully at her client.

[59] The defendant Sullivan, presiding over the trial, in fact suppressed all testimony concerning the critical overriding powers accorded to the trustee under Article 7(A).

[60] Prior to trial Liebman had already constructed traps to ensnare this plaintiff in, if nothing more, allegations of contempt of court orders. One construction was in collaboration with the defendant Leahy using the secretly undermined stipulation of June 18, 1985, [30] above. His expectation was to

be appointed guardian ad litem in any action for contempt of court, [23], [47], [48], [49] above.

[61] Liebman, a drug addict and in debt, urgently needed money sooner. On July 10, 1985 before trial began, Liebman told this plaintiff on the premises of the Middlesex County Probate Court House that if this plaintiff would transfer to Liebman control of his bank account, which Liebman believed to contain about $50,000, "All the trouble will be over."

Extortion and attempted extortion are predicate acts within the meaning of 18 U.S.C. §1961 when they interfere with property and enterprises, here a trust, which affect interstate commerce.

[62] The defendant Liebman had his heydays during the trial of this plaintiff from the afternoon of April 4, 1986 when the defendant Sullivan denied the trustee's motion for the appointment of an independent administrator, [14] above; and on April 8th, April 10th,

May 4th, May 15th, June 4th and June 10th.

The defendant Sullivan gave the defendant Liebman unfettered leave to have at the trustee, virtually undefended by counsel, in an attempt to dehumanize him and to form reasons to remove him. These were separate acts of conspiracy to commit the fraud of denying the trustee the services of honest and faithful judges and cognizable under provisions of 18 U.S.C. §§1961 et seq.

On or about September 4, 1986 the defendants Liebman and Sullivan used the United States Postal Service to profit from the described acts of fraud and conspiracy in demands upon this plaintiff.

[63] The morning of the tenth day of trial May 15, 1986 nevertheless brought at loggerheads the sub-schemes of the defendants Sullivan and Liebman. That morning the defendant Sullivan rashly ruled nunc pro tunc that the separate pre-trial restraining orders by the defendant Mc Govern and himself a year before

on May 24, 1985 and May 13, 1985 respectively, on different subjects, were one and the same and of the same date, the earlier one, wherefore the loan which the trustee had made to the trust out of his own funds for legal fees, on May 20, 1985 had been a violation of restraining orders, [13], [15], [36] above.

Liebman immediately scurried upstairs out of Judge Sullivan's court to the defendant Highgas, to get orders for ex parte attachment, contempt and short notice, [26], [27] above. Highgas gave then.

Out of pride but more soundly because of the offense to his own jurisdiction as trial judge, the defendant Sullivan refused to accept these orders, but ordered them served in court on this plaintiff nevertheless.

The defendant Sullivan's ruling nunc pro tunc was, however, indefensible as logic or in law. When this plaintiff, now managing his own cases, attacked the ruling by interlocutory appeal to the state Appeals Court, Liebman

shifted his grounds in pursuit of his cherished goal of contempt. Now he alleged that the trustee on the morning of December 6, 1986 had not transferred $30,546.35 to the administrator d.b.n. as Judge Sullivan had ordered him to do.

Although it entailed the abolishment of a banking event amply witnessed and recorded at the bank, and later testified to in his own court, the defendant Sullivan next adopted Liebman's version in his own defense in the federal court suit, to justify his act of ex parte attachment without notice, [19]. But this fraud upon the federal court was in the first place Liebman's and traceable directly to him. Its adoption by the defendant Sullivan only helped seal the conspiracy.

[64] This plaintiff encountered inexplicable obstacles and delays in obtaining transcripts of the proceedings for his appeal, even though in every case he prepaid the relevant court reporter. One delay lasting from May to August 1987 involved a court repor-

ter who was obviously in fear. Her transcript was of proceedings highly damaging to the defendant Liebman. This plaintiff finally had resort to an order of the court. Liebman's use of the United States Postal Service may be proved by testimony.

[65] A more difficult case involved another court reporter and a different transcript during eight months in 1989. Prepayment and, on demand, a subsequent payment was made through the mails without result. The plaintiff filed an action in Boston Municipal Court. Its summons through the mail was diverted. In separate appearances in separate courts, Liebman and the reporter involved knew of each other's involvement with the transcriot sought. An employee of the United Postal Service was suborned or prevented from delievering mail, and an internal investigation resulted.

The described acts in [64], [65], mail fraud and interference with the United States Postal Service to defraud, are predicate acts

within the meaning of 18 U.S.C. §1961 when employed for the purposes complained herein.

THE PATTERNS OF FRAUDULENT SCHEMES

A. THE ONGOING, OPEN AND NOTORIOUS ENTERPRISE

[66] In the period 1983-1991 if not before, at least four judges of the Middlesex Probate Court maintained special relationships with at least two lawyers who appeared as litigants before them, to their mutual illicit financial advantage.

The court was, and is, an experienced skinning facility dealing in the assets of mostly unwilling litigants who are recently bereaved or emotionally torn or represented by attorneys acquiescent to a mostly open enterprise which is separate from the ostensible public business of the Court. The acts of bribery, fraud, extortion and conspiracy committed are no less for being contrived in the guise of the forms of law, and in certain circumstances these are predicate acts for purposes of 18 U.S.C. §§ 1961 -1968.

[67] Because contrived in the guise of the forms of law, predicate acts have been perpetrated open, even flauntingly. "Go ahead and take me to the Appeals Court," said the defendant Mc Govern to this plaintiff.

The ongoing, separate enterprise of the Middlesex Probate Court is so open and notorious and therefore to some so reprehensible that some attorneys have resisted incorporation into the scheme by resisting court appointments, or have candidly told their clients that a fix was on and that the attorney could not help them; or in at least one case, have blown the whistle to the media, as with the defendant Highgas [22]

[68] The defendants herein conformed to the usual pattern of their separate enterprise under two principal legalistis covers. Since the trustee was 'clean' and had hoonorable careers in war and in a profession, it would be necessary to destroy his good name before spoliating his possessions. Therefore for

six days, after the trustee had effectively offered his resignation, the defendant Sullivan gave him over to Liebman's natural satanic talent for provocation and defamation.

Sullivan himself descended from his perch on the bench for the sport, to indulge his separate proclivities for wanton gossip. From allusions in the trustee's private journal which Liebman had subpoenaed from a cowed Snow White, Sullivan extracted, and raised to judicial notice a well kept family secret, that the principal plaintiff against the trustee had been, in plainest terms, a commercial whore. Then he faulted the trustee for his knowledge of it.

Secondly, where defamation would not stick, shallower forms of guilt were constructed ad hoc. These had as their object repeatedly the charge of contempt of court. Liebman labored diligently at this subscheme at different times and in separate concert with each of the others:

[a] In preparation for trial, with the defendant Leahy, by undermining secretly and by forgery the stipulation he had entered into, exposing this plaintiff thereby to the fraudulent charge of contempt of court [30].

[b] During trial with the defendant Highgas [26], [27], seizing on the defendant Sullivan's flawed ruling nunc pro tunc that same day [15], [63], thereby exposing this plaintiff to the fraudulent charge of contempt of court.

[c] Most grotesquely of all, many months after trial during the trustee's efforts to appeal, during the hearing Mc Govern called overnight expressly for the purpose, when her second summary judgment of contempt against the trustee for an alleged affront to Liebman necessarily raised Liebman openly to the status of an equal and peer of the court [42][d], [45].

The last moreover is precisely what the plaintiff alleges throughout herein.

[69] The defendant Sullivan appreciated,

however, that Liebman might have a wolf by the ears. Very soon after the close of trial, while the critical period for appeal ran pursuant to Rule 4(a) M.R.A.P., the defendant Sullivan allowed counsel for the trustee to withdraw precipitately from the case.

[70] About now the Boston Globe broke its story on Judge Highgas [22]. The orders he had given out of jurisdiction to Liebman [26], [27] now vanished from court files of the five cases against the trustee, but not before this plaintiff had made copies.

[71] In January 1987 the trustee had also entered his notices of appeal in time, a relatively simple matter. But now he had to cast about for new counsel for appeal and the means of financing it.

[72] The defendants Sullivan and Liebman countered with acts which served both the old purpose and a new one. Days apart in May 1987 the defendant Sullivan issued orders which encumbered the trustee's personal rights in

property in the amounts of $75,000 and $33,000 [17], [18]. This served the original purpose of of distributing a litigant's assets to the lawyers, including his own.

More cautious than Liebman, the defendant Sullivan preserved appearances. The wholesale redistribution was not part of his 'final' judgment, although to avoid the tort of intentional harm to the trustee's business the judge had an obligation to act directly and immediately at the time of final judgment, and not remotely, indirectly and consequentially. In his 'final' judgment the defendant Sullivan had awarded the attorneys trivial fees in order to create the appearance of conserving the estate [12].

The new purpose of the orders in May was to encumber the trustee's only means of financing his appeal, a fact of which the defendant Sullivan was well aware.

[73] During hearings before the defendant Sullivan in October and November 1986 the

trustee had testified that his only hope of entering an appeal was by mortgaging his property.

[74] The ex parte attachment which the defendant Sullivan gave to the defendant Liebman in May 1987 prevented this.

[75] One view of their victim overlooked by the racketeers was that in the past he had earned three prestigious university degrees. The trustee, now his own appellant, despised lawyers but could use law libraries.

[76] Hereafter the conspiratorial pattern of the defendants turned actively and in the end desperately toward concealment.

THE PATTERNS OF FRAUDULENT SCHEMES

B. CONCEALMENT AND ITS CONSEQUENCES

[77] Effects of the later emphasis on concealment involved the defendants in yet more overt violations of federal statutes. The defendant Mc Govern for the rest lowered their expectations. By her manifest partisanship for Liebman she also made explicit that he was an

insider on a par with the judicial defendants [45].

[78] The defendant Highgas or others acting for him removed records from court files. [70]. So did Liebman.

[79] The need for concealment constrained the defendant Sullivan on the advice and example of Liebman to commit a fraud upon a federal court concerning grounds on which he had given an ex parte attachment without prior notice [19].

[80] The defendant Liebman and others so far unnamed actively interfered with court reporters and the mails to prevent this plaintiff from having transcripts for his record on appeal [64], [65]. Despite this, the plaintiff was not negligent and had collected seven transcripts by the time Liebman presented his motion to the defendant Mc Govern to dismiss the appeal.

[81] In the need for concealment the defendant Mc Govern nevertheless ordered the plain-

tiff to have ten more transcripts produced within twenty-three days on pain of dismissal [41]. She mistakenly believed that a rule required an appellant to produce transcripts of all proceedings.

When the plaintiff showed this was not correct and managed to obtain four more transcripts in a short time, the defendants Liebman and Mc Govern realized they would not stop him and resorted to over constructions of fraudulent contempts [42], [44].

In the pattern well established by the defendant Highgas [22], [23] Liebman constructively bribed the defendant Mc Govern to appoint him guardian ad litem to prosecute the contempts against this plaintiff [42], [47], [48], [49].

[82] Because of the resistance encountered, the judicial defendants as represented by the defendant Mc Govern, but not Liebman, lowered their expectations. She 'limited' the plaintiff's issues on appeal to that over his bank

account, an appeal she contemplated dismissing on motion of Richard Liebman. By this manoeuver Judge Mc Govern retained for all the defendants prospects of redistributing to themselves over $30,000 in the plaintiff's bank account [39], [40].

This ready money was always Liebman's first objective, from his outright attempted extortion before trial [61], all through trial and behind each of the fraudulent constructed contempts.

But Liebman also held out for everything, which he calculated before Judge Mc Govern to be $209,000 [46].

COUNT ONE

THE JUDICIAL DEFENDANTS SHEILA E. MC GOVERN, JEREMIAH J. SULLIVAN, WILLIAM HIGHGAS, JR. AND VINCENT F. LEAHY

[83] The plaintiff realleges and incorporates by reference paragraphs [1] through [18], [20] through [41], paragraphs [54] and [55] and paragraphs [66] through [82] as if fully

stated herein.

[84] For the purpose of executing and attempting to execute the aforesaid schemes the judicial defendants defrauded the plaintiff of the honest and faithful services of judges in violation of 18 U.S.C. § 1961 et seq.

[85] Under the guise of the forms of law the judicial defendants devised schemes to convert his bank account and to extort a renunciation of business and property rights under Article 7(A) of a trust affecting interstate commerce, and injured the plaintiff in violation of 18 U.S.C. § 1961 seq.

[86] The aforesaid disguised forms of law were in fact acts of fraud, extortion and bribery which maintained an enterprise separate from the lawful business of the Middlesex Probate Court, before which interstate litigants appear from time to time, and affected interstate commerce in violation of 18 U.S.C. §1961 et seq.

[87] Each of the judicial defendants con-

structively accepted bribes through understandings that his or her opinion, action, judgment, decision or exercise of discretion as a public servant could be influenced by the defendant Liebman in circumstances which violated 18 U.S.C. § 1961 et seq.

[88] Each of the judicial defendants used the United States Postal Service, or caused it to be used, to further their racketeering schemes, in violation of 18 U.S.C. § 1961 et seq. [89] Each of the judicial defendants perpetrated two or more acts of fraud, bribery and extortion in violation of 18 U.S.C. § 1961 et seq.

[90] Said two or more acts as to each of the judicial defendants are in addition to conspiracy in violation of 18 U.S.C. § 1962(d) which is alleged below.

COUNT TWO

THE JUDICIAL DEFENDANT SHEILA E. MC GOVERN

[91] The plaintiff realleges and incorporates by reference paragraphs [42] through

[49] as if fully stated herein.

[92] The judicial defendant Sheila E. Mc Govern under color of office and in collaboration with another, Richard H. Liebman, attempted in violation of 18 U.S.C. § 1961 et seq. to extort from the plaintiff the renunciation of rights to property, business and business advantages affecting interstate commerce received under provisions of Article 7(A) of the Theresa Di Giambattista Revocable Trust.

[93] The judicial defendant Sheila E. Mc Govern defrauded the plaintiff of the honest and faithful service of judges by adjudging the plaintiff in summary contempt for an alleged offense to the defendant Richard H. Liebman, an attorney, convicted felon and litigant before the court, said punishments being reserved by Rule 43 M.R.C.P. to affronts to the court.

Said fraud, being in concealment of the racketeering activities of all the defendants was, in the circumstances described, a vio-

lation of 18 U.S.C. § 1961 et seq.

[94] The judicial defendant Sheila E. Mc Govern openly accepted a bribe when she incorporated into orders her intention of appointing a guardian ad litem for the purpose of prosecuting the plaintiff for contempt of court at his expense, when the idea was Liebman's and he had stated his anticipation of earning $20,000 to $50,000 in fees thereby; and in the circumstances the accepted bribe violated 18 U.S.C. § 1961 et seq.

COUNT THREE

THE JUDICIAL DEFENDANT JEREMIAH J. SULLIVAN

[95] The plaintiff realleges and incorporates paragraphs [16], [19] and [63] as if fully stated herein

[96] In order to conceal the aforesaid racketeering schemes and to avoid punishment the judicial defendant Jeremiah J. Sullivan perpetrated a fraud upon the United States District Court and employed the United States Postal Service in perpetration of the fraud by concealing

evidence and testimony over which he had presided as judge; and in the circumstances the aforesaid frauds violated 18 U.S.C. § 1961 et seq.

COUNT FOUR

THE DEFENDANT RICHARD H. LIEBMAN, AN ATTORNEY

[97] The plaintiff realleges and incorporates by reference paragraphs [33] and paragraphs [50] through [65] as if fully stated herein.

[98] On July 10, 1985 and as part of a continuing scheme pursued to the date of this complaint, the defendant Richard H. Liebman attempted to extort sums of between $30,000 and $50,000 belonging to the plaintiff and affecting interstate commerce.

The said multiple acts of attempted and constructive [and] actual extortion were pursued and executed under the guise of the forms of law and in fact by bribery, fraud and conspiracy [below] and in violation of 18 U.S.C. § 1961 et seq.

[99] On June 22, 1989, on June 26, 1989 and on June 27, 1989 and upon other occasions the defendant Liebman attempted to extort from this plaintiff a renunciation of his valuable rights to business, property and business advantages affecting interstate commerce which inured to this plaintiff under provisions of Article 7(A) of the Theresa Di Giambattista Revocable Trust; and such attempted extortions violated 18 U.S.C. § 1951 and 18 U.S.C. § 1961 et seq.

[100] On June 27, 1989 and on July 21, 1989 the defendant Liebman bribed and constructively bribed the Middlesex Probate Court of the County of Middlesex in Massachusetts, before which court interstate litigants appear, in order to interfere with and to injure this plaintiff's property and property advantages. Said property, business and business advantages affected and do affect interstate commerce, whereby the said interference and injury are in violation of 18 U.S.C. § 201 and 18 U.S.C.

§§ 1961 et seq. including § 1962(b) and § 1962(c).

[101] On September 19, 1989 the defendant Liebman bribed and constructively bribed the Middlesex County Probate Court of the County of Middlesex in Massachusetts, before which court interstate litigants appear from time to time, for the purpose of concealment of the violations of interfering with this plaintiff's property, business and business advantages affecting interstate commerce, said bribery and said violations being contrary to 18 U.S.C. § 201 and 18 U.S.C. §1961 et seq.

[102] On or about May 4, 1987 and on or about May 28, 1987 the defendant Liebman acquired by bribery, by conspiracy and through fraud in violation of Rule 4.1(f) M.R.C.P. interest and control in an enterprise belonging to the plaintiff, namely his rights under a trust affecting interstate commerce, in violation of 18 U.S.C. § 1962(b), § 1962(c).

[103] In order to conceal his schemes and

acts of racketeering, the defendant Liebman constructed and assisted in perpetrating a fraud upon the United States District Court for Massachusetts in November 1987 in violation of 18 U.S.C. § 1961 et seq. and other federal statutes.

[104] In order to conceal his schemes and acts of racketeering, between March 1987 and August 1987 the defendant Liebman and others used the United States Postal Service and suborned, intimidated, interfered with or prevented its employees from faithfully and honestly delivering the mail, in order to prevent this plaintiff from receiving two transcripts of proceedings in court, in violation of 18 U.S.C. § 1341, 18 U.S.C. § 1961 et seq. and other federal statutes.

COUNT FIVE

ALL DEFENDANTS : RACKETEERING ACTIVITIES

[105] The plaintiff realleges and incorporates by reference paragraphs [1] through [82], [84] through [90], [92] and [93], paragraph [95].

and [97] through [104] as if fully stated herein.

[106] The aforesaid multiple acts of racketeering by all the defendants named in this complaint are interrelated and are all part of a common and continuous pattern of schemes existing from at least 1983 to the present time. The ultimate objective of the pattern was to defraud litigants who came before the Middlesex Probate Court, including interstate litigants from time to time, to appropriate their assets under the guise of the forms of law, and to redistribute these assets in the form of sanctions, advserse judgments, attorney fee awards and other, among the judges of the court and the attorneys involved.

Racketeering activities of the Middlesex Probate Court which have directly affected this plaintiff began about May 1985 and continue to the time of this complaint. Other known activities which do not directly affect this plaintiff are, separately, twenty-nine

in number. These occurred between November 1983 and August 1986 and were perpetrated by a judge who is also one of the defendants herein. He has admitted the non-related activities to investigating state commissions,

[Editorial note: The preceding is the text of the orginal complaint. Below follows the text added in the First Amended Complaint from p.39 of the original complaint. Linking syntactical changes are not differentiated.]

and has stipulated therein that such activities are detrimental to a public interest, which is confidence in the impartiality of courts.

The maintenance of public confidence in courts of every category and jurisdiction is encompassed in the intent of 18 U.S.C. §§ 1961-1968, in which Congress conferred upon private citizens, as herein, private attorney general powers to reach through prosecutorial gaps. This complaint so does.

[107] This complaint alleges ninety-three predicate violations by the five defendants

against the plaintiff between May 24, 1985 and July 21, 1989 with injury continuing to the present. Exhibit "A," attached.

In addition account is taken [23] of twenty-nine more violations against others during the years 1983-1986 admitted by one of the defendants herein to state investigative entities.

In addition evidence discovered since filing of the original complaint herein is that from at least 1974 the defendant Liebman bribed and paid the defendant Sullivan in the latter's capacity of a judge of the Middlesex Probate Court and received 'all the plumbs' of appointment, and testimony willl so show.

The ongoing enterprise of the Middkesex Probate Court also predated and survived Liebman's term of imprisonment for conspiracy in armed robbery of a bank from 1977 to 1983; and has continued thereafter.

In sum this plaintiff alleges an enterprise ongoing from at least 1974 to 1989 or the present and describes one hundred twenty-two

RICO predicate violations, of which ninety-three have been to his own injury. Exhibit "A."

COUNT SIX

ALL DEFENDANTS : CONSPIRACY TO RACKETEER

[108] The plaintiff realleges and incorporates by reference paragraphs [1] through [82], [84] through [90], paragraphs [92], [93] and [95], paragraphs [97] through [104], and paragraphs [106] and [107] as if fully stated herein.

[109] Conspiracy to perpetrate a predicate violation is a separate and non-duplicitous RICO violation.

The plaintiff alleges that by their acts as enumerated and in the guise of the forms of law the defendants Sheila E. McGovern, Jeremiah J. Sullivan, William Highgas, Jr., Vincent F. Leahy, and Richard H. Liebman conspired to perpetrate acts of racketeering against this plaintiff in violation of 18 U.S.C. § 1962(d), that they succeeded in injuring him in his business and property, and that the injury continues.

The object of the conspiracy has been, as the defendants have otherwise successfully done in fifteen years or more of their continuing enterprise, to skin him of his assets for redistribution their personal benefit.

[110] In furtherance of the common conspiracy, all of the defendants on one or more occasions used or interfered with the United States Postal Service in violation of 18 U.S.C. § 1962(d).

[111] In order to conceal the common conspiracy and to escape lawful punishment therefor under federal statutes, the defendants Sullivan and Liebman, and constructively all the defendants, conspired to perpetrate a fraud upon the United States Court for Massachusetts by documents and pleadings falsely sworn and contrary to documented fact. Paper No. 8 at p.9, CA-87-2562-N (USDC MA).

COUNT SEVEN

AGAINST THE JUDICIAL DEFENDANT JEREMIAH J. SULLIVAN FOR OBSTRUCTION OF JUSTICE

[112] The plaintiff realleges and incorporates by reference paragraphs [16], [19], [69], [72], [73] and [111] as if fully stated herein and alleges as to the judicial defendant Jeremiah J. Sullivan:

[113] That at the conclusion of trial, and as the 30-day period for notice of appeal from his own decisions commenced to run, the defendant Sullivan unjustifiably allowed the precipitate withdrawal of this plaintiff's counsel from the case, thereby putting this plaintiff's appeal in jeopardy with the objective result of obstructing justice by concealing the ongoing enterprise of the Middlesex Probate Court, in violation of 18 U.S.C. § 1503, § 1961(1)(B).

[114] That in his capacity of trial judge the judicial defendant Sullivan was timely informed by this plaintiff that plaintiff's only means of financing an appeal from probate decisions lay in mortgaging his property; and that the ex parte attachment against said property which the judicial defendant Sullivan

subsequently gave to the defendant Liebman objectively served no other purpose than to prevent an appeal, whereby the named defendants injured this plaintiff in a lawsuit or property, a lesser included injury of the intent to conceal the ongoing enterprise of the Middlesex Probate Court by obstructing justice in violation of 18 U.S.C. § 1503, § 1961(1)(B).

[115] That when sued in United States District Court by this plaintiff for violation of plaintiff's constitutional rights in property by granting am ex parte attachment without prior notice and the posting of bond, the judicial defendant Sullivan falsely pleaded in defense that he had given the defendant Liebman an ex parte attachment against this plaintiff because this plaintiff had failed to turn over his bank account to the defendant Sullivan's own appointed administrator as ordered, when in fact the judicial defendant Sullivan had presided over hearings to the contrary.

On this false pleading by the defendant

Sullivan, and notwithstanding documentary evidence of fraud, the United States District Court, Nelson, J., nevertheless dismissed this plaintiff's complaint; wherefor this plaintiff alleges that the judicial defendant Sullivan through fraud obstructed justice in violation of 18 U.S.C. §1503, §1961(1)(B).

COUNT EIGHT

AGAINST THE JUDICIAL DEFENDANT SHEILA E. McGOVERN FOR OBSTRUCTION OF JUSTICE

[117] Without authority or empowerment, and contrary to universal appellate procedure and practice, on May 22, 1989 the judicial defendant Sheila E. McGovern purported to govern this plaintiff's choice of issues to be appealed from the orders of her own court. Her dictate had the objective result of giving the five defendants herein control over the plaintiff's bank account of $30,000 or more, an extortion under the guise of forms of law. See paragraph [40] herein.

Plaintiff alleges that the described act

of the judicial defendant McGovern was also an obstruction of justice intended to prevent his appeal therein, and a violation of U.S.C. § 1503 and of § 1961(1)(B), in order to further the ongoing enterprise.

[118] On May 24, 1989 the judicial defendant McGovern ordered this plaintiff to produce transcripts of the entire trial for his appeal, or ten more manuscripts to be produced in twenty-three days, on pain of his appeal 'dismissed' by her.

She was without authority to order a complete transcript, and her order was without precedent.

The plaintiff held her off by producing four more of the remaining ten transcripts of the trial.

Ultimately the Appeals Court reviewed the appeal with results unfavorable to this plaintiff, commenting unfavorably several times in its rescript opinion that it had received only a partial record.

FIRST AMENDED COMPLAINT

Plaintiff alleges that the judicial defendant McGovern under color of her office and by threat of 'dismissal' of his appeal, albeit illicit, induced the plaintiff to submit less than an adequate record as the Appeals Court viewed it; and that thereby the defendant Mc Govern perpetrated an obstruction of justice within the meaning of 18 U.S.C. §1503, §1961(1) (B) in order to further the ongoing enterprise of the Middlesex County Probate Court by interfering with appellate review of its operation.

[119] During their chance meeting in the court house the afternoon of June 26, 1989 when the judicial defendant McGovern detained him and phoned the defendant Liebman from the bench, the plaintiff appreciated that the defendant McGovern was aroused and angry because of the plaintiff's partial success in obtaining transcripts against her deadline.

When the defendant Liebman demanded over the phone a hearing for the next morning, and got it, the plaintiff arranged for a court

reporter to be present. The next morning, the judicial defendant McGovern had canceled the court reporter's appearance. Then she denied this plaintiff's motion for a continuance until one could be present, even at his own expense.

Plaintiff alleges that the judicial defendant McGovern was motivated by a need to keep acts of the ongoing enterprise off the record, whereby she obstructed justice within the meaning of 18 U.S.C. §§ 1503, 1961(1)(B).

COUNT NINE

[120] The plaintiff realleges and incorporates by reference paragraphs [31] and [32] as if fully stated herein.

[121] On May 28, 1987 this plaintiff appeared before the judicial defendant Vincent F. Leahy for hearing on his motion and affidavits to dissolve or reduce the ex parte attachment given by the defendant Sullivan to the defendant Liebman.

The plaintiff adduced both constitutional violations (not pursued in the present com-

plaint) and violations of state statutes governing ex parte attachments. Plaintiff had made clear his grounds in pleadings timely filed previous to the hearing. No. 85-E0116, Middlesex Probate Court, Papers 67, 68A, 68B. Plaintiff argued that the probate court, Sullivan, J., had accepted improperly and contrary to statute the averment of a convicted felon, Richard H. Liebman, for the pivotal affidavit of extraordinary circumstances required by Rule 4.1(f),(h) Mass. Civ. Proc. [Liebman's felony conviction and civil disability were well known, but forbidden territory. The court clerk helpfully sent a heavy file crashing to the floor in warning, but this plaintiff continued.]

In his judicial capacity the defendant Leahy denied this plaintiff's motion; but worse, denied without prejudice a motion by his present codefendant Liebman for 'sanctions, costs and legal fees' should this plaintiff once more pursue his constitutional and state

rights in the courts.

The defendant Leahy well knew what the game was. This plaintiff's pursuit of his legal rights threatened to expose the ongoing enterprise of many years' duration. The plaintiff alleges that the judicial defendant Leahy by his implied threat intended to obstruct justice in violation of 18 U.S.C. §1503 and §1961(1)(B).

COUNT TEN

AGAINST THE DEFENDANT RICHARD. H. LIEBMAN
FOR OBSTRUCTION OF JUSTICE

[122] The plaintiff realleges and incorporates by reference paragraphs [51], [52], [54], [58]. [64] and [65] as if fully stated herein.

[123] On May 25, 1985 this plaintiff filed with the Office of Bar Counsel a complaint concerning the conduct of the defendant Richard H. Liebman. B1-85-296-V. Charges included failure to make service, fraudulent alteration and substitution of documents, conspiracy to cause this plaintiff's arrest and subsequent abuse of process, and an attempt to extort $50,000.

Liebman retorted on July 2, 1985 with a motion under Rule 35 Mass. Civ. Proc. directed against the complainant, instead of answering the charges.

Risible as the bar's 'rules' of self-discipline may be, the defendant Liebman intended to obstruct them, and he obstructed justice within the meaning of 18 U.S.C. §1503, §1961(1)(B) in order to conceal from proper authority his long racketeering association with the ongoing enterprise of the Middlesex Probate Court.

[124] By usurpation of the legal standing and rights of his purported clients, whose consent to his acts after the year 1985 the defendant Liebman cannot show, Liebman has obstructed justice within the meaning of 18 U.S.C. §1503, §1961(1)(B) by constituting himself at once counsel, plaintiff and defendant in these and related matters. This plaintiff is thereby injured in his capacity to pursue his legal rights.

[125] By intimidation of one Joanne Santasky,

a court reporter appointed by the Middlesex Probate Court or by the Commonwealth Probate Court Department, the defendant Liebman obstructed justice and violated 18 U.S.C. §1503, §1961(1)(B) by preventing the production and delivery to this plaintiff of a prepaid transcript of probate court proceedings on May 22, 1985 in which was contained clear evidence of plaintiff's charge against Liebman of the abuse of process in the matter of the plaintiff's conspired arrest.

[126] In willing and concerted action with one Chuck Janey, a court reporter appointed by the Middlesex Probate Court or Commonwealth Probate Court Department, the defendant Liebman obstructed justice and violated 18 U.S.C. §1503, §1961(1)(B) by preventing the production and delivery to this plaintiff of a prepaid transcript of trial in the probate court on May 14, 1986 in which was contained clear evidence of this plaintiff's charge against Liebman of Liebman's abuse of process by introduction of

this plaintiff's conspired arrest into probate proceedings, and of a second motion by Liebman under Rule 35 Mass. Civ. Proc., for mental examination of this plaintiff, testifying as trustee and executor, intended to controvert the trustee's continuing testimony at trial. Interference with delivery of the transcript continued for many months, involving interference with the United States Postal Service and the subornation of a mail carrier.

RESERVATION AS TO ALL COUNTS

[127] For convenience and brevity the foregoing ten counts are set out by category in preference to actual number. The plaintiff anticipates that in course of trial, and upon appropriate instruction to the jury, subdivision will occur resulting in a greater number for deliberation by the jury.

Exhibit "A" shows that by a 'brick-by-brick' approach, as many as eighty-six counts against the the five named defendants could result. See Exhibit "A" at pages [173-176].

THE RELIEF REQUESTED FROM THIS COURT

WHEREFORE, pursuant to 18 U.S.C. §1964(c) and other applicable law the plaintiff requests from this court relief and judgment as follows:

(A) Jury trial of all the issues.

(B) As to Counts One through Ten, or as they may be further subdivided and numbered, the plaintiff seeks from all five named defendants treble damages for his injuries in an amount to be determined by a jury, except that the plaintiff offers the following measure of damages for consideration, to be multiplied and apportioned suitably to findings:

1. The amount of $209,000 plus
2. The amount of $75,000 plus
3. The amount of $33,000 plus
4. The amount of $30,546.35 with interest from December 8, 1986.

(C) Costs and expenses to the plaintiff in

the prosecution of this lawsuit including the equivalent of reasonable legal fees notwithstanding that plaintiff manages his own case and is not a member of any bar.

(D) An order or orders granting such further relief as this court may deem just and proper.

C. D. Di Giambattista
Plaintiff
Managing His Own Case

August 19, 1991

Exhibit "A" is attached as pages [173-176.]

FIRST AMENDED COMPLAINT

EXHIBIT A

Analysis of Ninety-three Civil RICO Predicate Act Violations, May 24, 1985 to July 21, 1989 Alleged by Plaintiff

B = Bribery E = Extortion

C = Conspiracy F = Fraud

O = Obstruction of Justice

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[14], [62]	....	C	.....		C	....
[15], [63]	....	F	.....			
[15], [63]	....	C	.....		C	....
[15],[26],[63]	.....		F	.....	C	....
[15],[26],[63]	.....		F	.....	C	....
[15],[26],[63]	.....		F	.....	C	....
[15],[26],[63]	.....		C	.....	C	....
[15],[26],[63]	.....		C	.....	C	....
[15],[26],[63]	.....		C	.....	C	....
[17]	....	F	.....		F	....
[18]	....	F	.....		F	....

EXHIBIT A CONT.

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[19]		F			C	
[19]		O			C	
[30][b]				F		
[30][b]				C	C	
[30][c]				C	F	
[31]				F		
[31]				C	C	
[32]				O	C	
[33]				B	B	
[37]	C				C	
[38]	F					
[38]	F					
[39]	O					
[40]	C				C	
[41]	F					

FIRST AMENDED COMPLAINT

EXHIBIT A CONT.

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[41]	O					
[41]	C				C	
[42][a]	E				E	
[42][d]	E				E	
[43]	O					
[44]	F					
[45]	F					
[46]	B				B	
[47]	B				B	
[48]	F				C	
[48]	E				E	
[49]	F				C	
[49]	E				E	
[51]					O	
[52]					O	
[54]					O	
[55]	F	F	F	F		

FIRST AMENDED COMPLAINT

EXHIBIT A CONT.

Numbered Paragraph, Complaint	Charged Against the Defendant(s)					
	McGovern	Sullivan	Highgas	Leahy	Liebman	Others
[58]	....	F.....				
[58]	....	O.....			O..	O
[58]	....	C.....			C..	C
[59]	.....	F.....				
[59]	....	O.....			C...	C
[61]	.....				E....	
[64]	.....				O...	O
[65]	.....				F...	F
[65]	.....				O...	O
[65]	.....				C...	C
Subtotals	20	13	6	8	39	7

ORDER FOR DISCOVERY

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 91-11140-N

C. D. DI GIAMBATTISTA

v.

SHEILA E. MC GOVERN ET AL.

ORDER

Issue having been joined in the above-entitled action, counsel shall complete all discovery within six (6) months from the date of this order, unless shortened or enlarged by order of this court. Any motions to enlarge time which have not been assented to by all parties are not effective unless endorsed by the court.

David S. Nelson

United States District Judge

August 22, 1991